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SENATE

REPORT
101-77

# FAMILY AND MEDICAL LEAVE ACT OF 1989

JULY 13 (legislative day, JANUARY 3), 1989.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

## REPORT

[To accompany S. 345]

The Committee on Labor and Human Resources, to which was referred the bill (S. 345) to entitle employees to family leave in certain cases involving a birth, an adoption, or a serious health condition of a child or parent and to temporary medical leave in certain cases involving a serious health condition, with adequate protection of the employees' employment and health benefit rights, having considered the same, reports favorably thereon and recommends that the bill do pass.

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29-010

S543-5

## I. THE BILL AS REPORTED

[S. 345, 101ST CONG., 1ST SESS.]

A BILL To grant employees family and temporary medical leave under certain circumstances, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the "Family and Medical Leave Act of 1989".

(b) TABLE OF CONTENTS.—

TITLE I—GENERAL REQUIREMENTS FOR FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE

Sec. 101. Findings and purposes.
Sec. 102. Definitions.
Sec. 103. Family leave requirement.
Sec. 104. Temporary medical leave requirement.
Sec. 105. Certification.
Sec. 106. Employment and benefits protection.
Sec. 107. Prohibited acts.
Sec. 108. Administrative enforcement.
Sec. 109. Enforcement by civil action.
Sec. 110. Investigative authority.
Sec. 111. Relief.
Sec. 112. Notice.

TITLE II—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE FOR CIVIL SERVICE EMPLOYEES

Sec. 201. Family leave and temporary medical leave.

TITLE III—COMMISSION ON FAMILY AND MEDICAL LEAVE

Sec. 301. Establishment.
Sec. 302. Duties.
Sec. 303. Membership.
Sec. 304. Compensation.
Sec. 305. Powers.
Sec. 306. Termination.

TITLE IV—MISCELLANEOUS PROVISIONS

Sec. 401. Effect on other laws.
Sec. 402. Effect on existing employment benefits.
Sec. 403. Encouragement of more generous leave provisions.
Sec. 404. Regulations.
Sec. 405. Effective dates.

# TITLE I—GENERAL REQUIREMENTS FOR FAMILY LEAVE AND MEDICAL LEAVE

**SEC. 101. FINDINGS AND PURPOSES.**

(a) FINDINGS.—Congress finds that—

(1) the number of two-parent households in which both parents work and the number of single-parent households in which the single parent works are increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early child rearing and the care of children who have serious health conditions;

(3) the lack of employment policies to accommodate working parents forces many individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent the employees from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects their working lives more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) PURPOSES.—It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families;

(2) to promote the economic security and stability of families;

(3) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child or parent who has a serious health condition;

(4) to accomplish such purposes in a manner which accommodates the legitimate interests of employers;

(5) to accomplish such purposes in a manner which, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(6) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

SEC. 102. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, including "commerce" and any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947 (29 U.S.C 141 et seq.).

(2) EMPLOY.—The term "employ" has the same meaning given the term in section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)).

(3) EMPLOYEE.—

(A) IN GENERAL.—The term "employee" means an individual that is included under the definition of such term in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)) who has been employed by the employer with respect to whom benefits are sought under this Act for at least—

(i) 900 hours of service during the previous 12-month period; and

(ii) 12 months.

"(B) EXCLUSION.—The term "employee" does not include any Federal officer or employee covered under subchapter III of chapter 63 of title 5, United States Code (as added by title II of this Act).

(4) EMPLOYER.—The term "employer"—

(A) means any person engaged in commerce or in any industry or activity affecting commerce who employs 20 or more employees at any one worksite for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(B) includes—

(i) any person who acts directly or indirectly in the interest of an employer to one or more employees; and

(ii) any successor in interest of such an employer; and

(C) includes any public agency, as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).

(5) EMPLOYMENT BENEFITS.—The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether the benefits are provided by a policy or practice of an employer or by an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)).

(6) HEALTH CARE PROVIDER.—The term "health care provider" means—

(A) any person licensed under Federal, State, or local law to provide health care services, or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) PARENT.—The term "parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian.

(8) PERSON.—The term "person" has the same meaning given the term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(9) REDUCED LEAVE SCHEDULE.—The term "reduced leave schedule" means leave scheduled for fewer than the usual number of hours of an employee per workweek or hours per workday.

(10) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(11) SERIOUS HEALTH CONDITION.—The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment or continuing supervision by a health care provider.

(12) SON OR DAUGHTER.—The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a de facto parent, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) STATE.—The term "State" has the same meaning given the term in section 3(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(c)).

**SEC. 103. FAMILY LEAVE REQUIREMENT.**

(a) IN GENERAL.—

(1) ENTITLEMENT TO LEAVE.—An employee shall be entitled, subject to section 105, to 10 workweeks of family leave during any 24-month period—

(A) as the result of the birth of a son or daughter of the employee;

(B) as the result of the placement, for adoption or foster care, of a son or daughter with the employee; or

(C) in order to care for the employee's son or daughter or parent who has a serious health condition.

(2) EXPIRATION OF ENTITLEMENT.—The entitlement to leave under paragraphs (1)(A) and (1)(B) shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) INTERMITTENT LEAVE.—In the case of a son or daughter or parent who has a serious health condition, such leave may be taken intermittently when medically necessary, subject to subsection (e).

(b) REDUCED LEAVE.—On agreement between the employer and the employee, leave under this section may be taken on a reduced leave schedule, however, such reduced leave schedule shall not result in a reduction in the total amount of leave to which the employee is entitled.

(c) UNPAID LEAVE PERMITTED.—Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

(d) RELATIONSHIP TO PAID LEAVE.—

(1) UNPAID LEAVE.—If an employer provides paid family leave for fewer than 10 workweeks, the additional weeks of leave added to attain the 10 workweek total may be unpaid.

(2) SUBSTITUTION OF PAID LEAVE.—An employee or employer may elect to substitute any of the employee's accrued paid vacation leave, personal leave, or other appropriate paid leave for any part of the 10-week period.

(e) FORESEEABLE LEAVE.—

(1) REQUIREMENT OF NOTICE.—In any case in which the necessity for leave under this section is foreseeable based on an expected birth or adoption, the employee shall provide the employer with prior notice of such expected birth or adoption in a manner which is reasonable and practicable.

(2) DUTIES OF EMPLOYEE.—In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee shall—

(A) make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee's son or daughter; and

(B) provide the employer with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

(3) REGULATIONS.—The Secretary shall promulgate regulations under section 108(a) that define the term "reasonable and practicable" for purposes of paragraphs (1) and (2)(B).

(f) SPOUSES EMPLOYED BY THE SAME EMPLOYER.—In any case in which a husband and wife entitled to family leave under this section are employed by the same employer, the aggregate number of workweeks of family leave to which both may be entitled may be limited to 10 workweeks during any 24-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

SEC. 104. TEMPORARY MEDICAL LEAVE REQUIREMENT.

(a) IN GENERAL.—

(1) ENTITLEMENT TO LEAVE.—Any employee who, as the result of a serious health condition, becomes unable to perform the functions of the position of the employee, shall be entitled to temporary medical leave, subject to section 105.

(2) PERIOD OF ENTITLEMENT.—The entitlement under paragraph (1) shall continue for as long as the employee is unable to perform the functions, except that the leave shall not exceed 13 workweeks during any 12-month period.

(3) INTERMITTENT LEAVE.—Leave taken under this subsection may be taken intermittently when medically necessary, subject to subsection (d).

(b) UNPAID LEAVE PERMITTED.—Except as provided in subsection (c), leave granted under subsection (a) may consist of unpaid leave.

(c) RELATIONSHIP TO PAID LEAVE.—

(1) IN GENERAL.—If an employer provides paid temporary medical leave or paid sick leave for fewer than 13 weeks, the additional weeks of leave added to attain the 13-week total may be unpaid.

(2) SUBSTITUTION OF PAID LEAVE.—An employee or employer may elect to substitute the employee's accrued paid vacation leave, sick leave, or other appropriate paid leave for any part of the 13-week period, except that nothing in this Act shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(d) FORESEEABLE LEAVE.—

(1) DUTIES OF EMPLOYEE.—In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee shall—

(A) make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employer, subject to the approval of the employee's health care provider, and

(B) provide the employer with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

(2) REGULATIONS.—The Secretary shall promulgate regulations under section 108(a) that define the term "reasonable and practicable" for purposes of paragraph (1).

**SEC. 105. CERTIFICATION.**

(a) IN GENERAL.—An employer may require that a claim for family leave under section 103(a)(1)(C), or temporary medical leave under section 104, be supported by certification issued by the health care provider of the son, daughter, parent, or employee, whichever is appropriate. The employee shall provide a copy of such certification to the employer.

(b) SUFFICIENT CERTIFICATION.—The certification shall be considered sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the provider regarding the condition; and

(4)(A) for purposes of leave under section 104, a statement that the employee is unable to perform the functions of the employee's position; and

(B) for purposes of leave under section 103(a)(1)(C), an estimate of the amount of time that the employee is needed to care for the son, daughter, or parent.

(c) SECOND OPINION.—

(1) IN GENERAL.—In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a), the employer may require, at its own expense, that the employee obtain the opinion of a second health care provider designated or approved by the employer concerning the information certified under subsection (b).

(2) LIMITATION.—Any health care provider designated or approved under paragraph (1) may not be employed on a regular basis by the employer.

(d) RESOLUTION OF CONFLICTING OPINIONS.—

(1) IN GENERAL.—In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employer may require, at its own expense, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) FINALITY.—The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) SUBSEQUENT RECERTIFICATION.—The employer may require that the employee obtain subsequent recertifications on a reasonable basis.

**SEC. 106. EMPLOYMENT AND BENEFITS PROTECTION.**

(a) RESTORATION TO POSITION.—

(1) IN GENERAL.—Any employee who takes leave under section 103 or 104 for its intended purpose shall be entitled, on return from the leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) LOSS OF BENEFITS.—The taking of leave under this title shall not result in the loss of any employment benefit accrued before the date on which the leave commenced.

(3) LIMITATIONS.—Except as provided in subsection (b), nothing in this section shall be considered to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than that to which the employee was entitled to on the date the leave was commenced.

(4) CERTIFICATION.—As a condition to restoration under paragraph (1), the employer may have a policy that requires each employee to receive certification from the employee's health care provider that the employee is able to resume work.

(5) CONSTRUCTION.—Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 103 or 104 to periodically report to the employer on the employee's status and intention to return to work.

(b) MAINTENANCE OF HEALTH BENEFITS.—During any period an employee takes leave under section 103 or 104, the employer shall maintain coverage under any group health plan (as defined in section 162(i)(3) of the Internal Revenue Code of 1954) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously from the date the employee commenced the leave until the date the employee is restored under subsection (a).

SEC. 107. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.—

(1) EXERCISE OF RIGHTS.—It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.

(2) DISCRIMINATION.—It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) INTERFERENCE WITH PROCEEDINGS OR INQUIRIES.—It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because the individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given or is about to give any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified or is about to testify in any inquiry or proceeding relating to any right provided under this title.

SEC. 108. ADMINISTRATIVE ENFORCEMENT.

(a) IN GENERAL.—The Secretary shall issue such rules and regulations as are necessary to carry out this section, including rules and regulations concerning service of complaints, notice of hearings, answers and amendments to complaints, and copies of orders and records of proceedings.

(b) CHARGES.—

(1) FILING.—Any person alleging an act that violates this title may file a charge respecting the violation with the Secretary. Charges shall be in such form and contain such information as the Secretary shall require by regulation.

(2) NOTIFICATION.—Not later than 15 days after the Secretary receives notice of a charge under paragraph (1), the Secretary shall—

(A) serve a notice of the charge on the person charged with the violation; and

(B) inform such person and the charging party as to the rights and procedures provided under this title.

(3) TIME OF FILING.—A charge may not be filed later than 1 year after the date of the last event constituting the alleged violation.

(c) PROCESS ON NOTICE OF A CHARGE.—Investigation; Complaint.—

(1) INVESTIGATION.—Within the 60-day period after the Secretary receives any charge, the Secretary shall investigate the charge and issue a complaint based on the charge or dismiss the charge.

(2) COMPLAINT BASED ON CHARGE.—If the Secretary determines that there is a reasonable basis for the charge, the Secretary shall issue a complaint based on the charge and promptly notify the charging party and the respondent as to the issuance.

(3) DISMISSAL.—If the Secretary determines that there is no reasonable basis for the charge, the Secretary shall dismiss the charge and promptly notify the charging party and the respondent as to the dismissal.

(4) SETTLEMENT AGREEMENTS.—

(A) WITH CHARGING PARTY.—The charging party and the respondent may enter into a settlement agreement concerning the violation alleged in the charge before any determination is reached by the Secretary under this subsection. To be effective such an agreement must be determined by the Secretary to be consistent with the purposes of this title.

(B) WITH SECRETARY.—On the issuance of a complaint, the Secretary and the respondent may enter into a settlement agreement concerning a violation alleged in the complaint. Any such settlement may not be entered into over the objection of the charging party, unless the Secretary determines that the settlement provides a full remedy for the charging party.

(5) CIVIL ACTIONS.—If, at the end of the 60-day period referred to in paragraph (1), the Secretary—

(A) has not issued a complaint under paragraph (2);

(B) has dismissed the charge under paragraph (3); or

(C) has not approved or entered into a settlement agreement under subparagraph (A) or (B) of paragraph (4);

the charging party may elect to bring a civil action under section 109.

(6) COMPLAINT AND RELIEF ON SECRETARY'S INITIATIVE.—

(A) ISSUANCE.—The Secretary may issue and serve a complaint alleging a violation of this title on the basis of information and evidence gathered as a result of an investigation initiated by the Secretary pursuant to section 110.

(B) RELIEF.—

(i) IN GENERAL.—On issuance of a complaint, the Secretary shall have the power to petition the United States district court for the district in which the violation is alleged to have occurred, or in which the respondent resides or transacts business, for appropriate temporary relief or a restraining order.

(ii) NOTICE.—On the filing of any such petition, the court shall cause notice of the petition to be served on the respondent.

(iii) TYPE OF RELIEF.—The court shall have jurisdiction to grant to the Secretary such temporary relief or restraining order as the court considers just and proper.

(d) RIGHTS OF PARTIES.—

(1) SERVICE OF COMPLAINT.—In any case in which a complaint is issued under subsection (c), the Secretary shall, not later than 10 days after the date on which the complaint is issued, cause to be served on the respondent a copy of the complaint.

(2) PARTIES TO COMPLAINT.—Any person filing a charge alleging a violation of this title may elect to be a party to any complaint filed by the Secretary alleging the violation. The election must be made before the commencement of a hearing.

(3) CIVIL ACTION.—The failure of the Secretary to comply in a timely manner with any obligation assigned to the Secretary under this title shall entitle the charging party to elect, at the time of such failure, to bring a civil action under section 109.

(e) CONDUCT OF HEARING.—

(1) PROSECUTION BY SECRETARY.—The Secretary shall prosecute any complaint issued under subsection (c).

(2) HEARING.—An administrative law judge shall conduct a hearing on the record with respect to a complaint issued under this title. The hearing shall be conducted in accordance with sections 554, 555, and 556 of title 5, United States Code, and shall be commenced within 60 days after the issuance of the complaint, unless the judge, in the judge's discretion, determines that the purposes of this Act would best be furthered by commencement of the action after the expiration of such period.

(f) FINDINGS AND CONCLUSIONS.—

(1) IN GENERAL.—After a hearing is conducted under this section, the administrative law judge shall promptly make findings of fact and conclusions of law, and, if appropriate, issue an order for relief as provided in section 111.

(2) NOTIFICATION CONCERNING DELAY.—The administrative law judge shall inform the parties, in writing, of the reason for any delay in making the findings and conclusions if the findings and conclusions are not made within 60 days after the conclusion of the hearing.

(g) FINALITY OF DECISION; REVIEW.—

(1) FINALITY.—The decision and order of the administrative law judge shall become the final decision and order of the Secretary unless, on appeal by an aggrieved party taken not later than 30 days after the action, the Secretary modifies or vacates the decision, in which case the decision of the Secretary shall be the final decision.

(2) REVIEW.—Not later than 60 days after the entry of the final order of the Secretary under paragraph (1), any person aggrieved by the final order may obtain a review of the order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

(3) JURISDICTION.—On the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, except that the same shall be subject to review by the Supreme Court of the United States on writ of certiorari or certification as provided in section 1254 of title 28, United States Code.

(h) COURT ENFORCEMENT OF ADMINISTRATIVE ORDERS.—

(1) POWER OF SECRETARY.—If a respondent does not appeal an order of the Secretary under subsection (g)(2), the Secretary may petition the United States district court for the district in which the violation is alleged to have occurred, or in which the respondent resides or transacts business, for the enforcement of the order of the Secretary, by filing in the court a written petition praying that the order be enforced.

(2) JURISDICTION.—On the filing of the petition, the court shall have jurisdiction to make and enter a decree enforcing the order of the Secretary. In the proceeding, the order of the Secretary shall not be subject to review.

(3) DECREE OF ENFORCEMENT.—If, on appeal of an order under subsection (g)(2), the United States court of appeals does not reverse or modify the order, the court shall have the jurisdiction to make and enter a decree enforcing the order of the Secretary.

SEC. 109. ENFORCEMENT BY CIVIL ACTION.

(a) RIGHT TO BRING CIVIL ACTION.—

(1) IN GENERAL.—Subject to the limitations in this section, an employee or the Secretary may bring a civil action against any employer to enforce the provisions of this title in any appropriate court of the United States or in any State court of competent jurisdiction.

(2) NO CHARGE FILED.—Subject to paragraph (3), a civil action may be commenced under this subsection without regard to whether a charge has been filed under section 108(b).

(3) LIMITATIONS.—No civil action may be commenced under paragraph (1) if the Secretary—

(A) has approved, or has failed to disapprove, a settlement agreement under section 108(c)(4), in which case no civil action may be filed under this subsection if the action is based on a violation alleged in the charge and resolved by the agreement; or

(B) has issued a complaint under section 108(c)(2) or 108(c)(6), in which case no civil action may be filed under this subsection if the action is based on a violation alleged in the complaint.

(4) TO ENFORCE SETTLEMENT AGREEMENTS.—Notwithstanding paragraph (3)(A), a civil action may be commenced to enforce the terms of any such settlement agreement.

(5) TIMING OF COMMENCEMENT OF CIVIL ACTION.—

(A) IN GENERAL.—Except as provided in subparagraph (B), no civil action may be commenced more than 1 year after the date on which the alleged violation occurred.

(B) EXCEPTION.—In any case in which—

(i) a timely charge is filed under section 108(b); and

(ii) the failure of the Secretary to issue a complaint or enter into a settlement agreement based on the charge (as provided under section 108(c)(4)) occurs more than 11 months after the date on which any alleged violation occurred,

the employee may commence a civil action not more than 30 days after the date on which the employee is notified of the failure.

(6) AGENCIES.—The Secretary may not bring a civil action against any agency of the United States.

(b) VENUE.—An action brought under subsection (a) in a district court of the United States may be brought—

(1) in any appropriate judicial district under section 1391 of title 28, United States Code; or

(2) in the judicial district in the State in which—

(A) the employment records relevant to the violation are maintained and administered; or

(B) the aggrieved person worked or would have worked but for the alleged violation.

(c) NOTIFICATION OF THE SECRETARY; RIGHT TO INTERVENE.—A copy of the complaint in any action brought by an employee under subsection (a) shall be served on the Secretary by certified mail. The Secretary shall have the right to intervene in a civil action brought by an employee under subsection (a).

(d) ATTORNEYS FOR THE SECRETARY.—In any civil action brought under subsection (a), attorneys appointed by the Secretary may appear for and represent the Secretary, except that the Attorney General and the Solicitor General shall conduct any litigation in the Supreme Court.

**SEC. 110. INVESTIGATIVE AUTHORITY.**

(a) IN GENERAL.—To ensure compliance with the provisions of this title, or any regulation or order issued under this title, subject to subsection (c), the Secretary shall have the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) OBLIGATION TO KEEP AND PRESERVE RECORDS.—An employer shall keep and preserve records in accordance with section 11(c) of such Act, and in accordance with regulations issued by the Secretary.

(c) REQUIRED SUBMISSIONS GENERALLY LIMITED TO AN ANNUAL BASIS.—The Secretary may not under this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once in any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge brought pursuant to section 108.

(d) SUBPOENA POWERS, ETC.—For purposes of any investigation conducted under this section, the Secretary shall have the subpoena authority provided under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

(e) DISSEMINATION OF INFORMATION.—The Secretary may make available to any person substantially affected by any matter that is the subject of an investigation under this section, and to any department or agency of the United States, information concerning any matter that may be the subject of the investigation.

SEC. 111. RELIEF.

(a) INJUNCTIVE RELIEF.—

(1) CEASE AND DESIST.—On finding a violation under section 108 by a person, an administrative law judge shall issue an order requiring the person to cease and desist from any act or practice that violates this title.

(2) INJUNCTIONS.—In any civil action brought under section 109, a court may grant as relief any permanent or temporary injunction, temporary restraining order, or other equitable relief as the court considers appropriate.

(b) MONETARY DAMAGES.—

(1) IN GENERAL.—Any employer that violates this title shall be liable to the injured party in an amount equal to—

(A) any wages, salary, employment benefits, or other compensation denied or lost to the employee by reason of the violation, plus interest on the total monetary damages calculated at the prevailing rate; and

(B) an additional amount equal to the greater of—

(i) the amount determined under subparagraph (A), as liquidated damages; or

(ii) the amount of consequential damages but not to exceed three times the amount determined under subparagraph (A).

(2) GOOD FAITH.—If an employer who has violated this title proves to the satisfaction of the court that the act or omission which violated this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this title, the court may, in its discretion, reduce the amount of the liability or penalty provided for under this subsection to the amount determined under paragraph (1)(A).

(c) ATTORNEYS' FEES.—A prevailing party (other than the United States) may be awarded a reasonable attorneys' fee as part of the costs, in addition to any relief awarded. The United States shall be liable for costs in the same manner as a private person.

(d) LIMITATION.—Damages awarded under subsection (b) may not accrue from a date more than 2 years before the date on which a charge is filed under section 108(b) or a civil action is brought under section 109.

SEC. 112. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

(b) PENALTY.—Any employer who willfully violates this section shall be fined not more than $100 for each separate offense.

# TITLE II—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE FOR CIVIL SERVICE EMPLOYEES

SEC. 201. FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE.

(a) IN GENERAL.—(1) Chapter 63 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER III—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE

**"§ 6331. Definitions**

"For purposes of this subchapter:

"(1) 'employee' means—

"(A) an employee as defined by section 6301(2) of this title (excluding an individual employed by the government of the District of Columbia); and

"(B) an individual under clause (v) or (ix) of such section;

who has been employed for at least 12 months and completed at least 900 hours of service during the previous 12-month period.

"(2) 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves—

"(A) inpatient care in a hospital, hospice, or residential medical care facility; or

"(B) continuing treatment, or continuing supervision, by a health care provider;

"(3) 'son or daughter' means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a de facto parent, who is—

"(A) under 18 years of age; or

"(B) 18 years of age or older and incapable of self-care because of a mental or physical disability; and

"(4) 'parent' means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian.

**"§ 6332. Family leave requirement**

"(a)(1) An employee shall be entitled, subject to section 6334, to 10 workweeks of family leave during any 24-month period—

"(A) as the result of the birth of a son or daughter of the employee;

"(B) as the result of the placement, for adoption or foster care, of a son or daughter with the employee; or

"(C) in order to care for the employee's son or daughter or parent who has a serious health condition.

"(2) The entitlement to leave under paragraphs (1)(A) and (1)(B) shall expire at the end of the 12-month period beginning on the date of such birth or placement.

"(3) In the case of a son or daughter or parent who has a serious health condition, such leave may be taken intermittently when medically necessary, subject to subsection (e).

"(b) On agreement between the employing agency and the employee, leave under this section may be taken on a reduced leave schedule, however, such reduced leave schedule shall not result in a reduction in the total amount of leave to which the employee is entitled.

"(c) Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

"(d)(1) If an employing agency provides paid family leave for fewer than 10 workweeks, the additional weeks of leave added to attain the 10 workweek total may be unpaid.

"(2) An employee or employing agency may elect to substitute any of the employee's accrued paid vacation leave, personal leave, or other appropriate paid leave for any part of the 10-week period.

"(e)(1) In any case in which the necessity for leave under this section is foreseeable based on an expected birth or adoption, the employee shall provide the employing agency with prior notice of such expected birth or adoption in a manner which is reasonable and practicable.

"(2) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee shall—

"(A) make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee's son or daughter; and

"(B) provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

"(3) The Director of the Office of Personnel Management shall promulgate regulations that define the term 'reasonable and practicable' for purposes of paragraphs (1) and (2)(B).

**"§ 6333. Temporary medical leave requirement**

"(a)(1) Any employee who, as the result of a serious health condition, becomes unable to perform the functions of the position of the

employee, shall be entitled to temporary medical leave, subject to section 6334.

"(2) The entitlement under paragraph (1) shall continue for as long as the employee is unable to perform the functions, except that the leave shall not exceed 13 administrative workweeks of the employee during any 12-month period.

"(3) Leave taken under this subsection may be taken intermittently when medically necessary, subject to subsection (d).

"(b) Except as provided in subsection (c), leave granted under subsection (a) may consist of unpaid leave.

"(c)(1) If an employing agency provides paid temporary medical leave or paid sick leave for fewer than 13 weeks, the additional weeks of leave added to attain the 13-week total may be unpaid.

"(2) An employee or employing agency may elect to substitute the employee's accrued paid vacation leave, sick leave, or other appropriate paid leave for any part of the 13-week period, except that nothing in this Act shall require an employing agency to provide paid sick leave or paid medical leave in any situation in which such employing agency would not normally provide any such paid leave.

"(d)(1) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee shall—

"(A) make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the employee's health care provider, and

"(B) provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

"(2) The Director of the Office of Personnel Management shall promulgate regulations that define the term "reasonable and practicable" for purposes of paragraph (1).

**"§ 6334. Certification**

"(a) An employing agency may require that a claim for family leave under section 6332(a)(10)(C), or temporary medical leave under section 6333, be supported by certification issued by the health care provider of the son, daughter, parent, or employee, whichever is appropriate. The employee shall provide a copy of such certification to the employing agency.

"(b) The certification shall be considered sufficient if it states—

"(1) the date on which the serious health condition commenced;

"(2) the probable duration of the condition;

"(3) the appropriate medical facts within the knowledge of the provider regarding the condition; and

"(4)(A) for purposes of leave under section 6333, a statement that the employee is unable to perform the functions of the employee's position; and

"(B) for purposes of leave under section 6332(a)(1)(C), an estimate of the amount of time that the employee is needed to care for the son, daughter, or parent.

"(c)(1) In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a), the employing agency may require, at its expense, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning the information certified under subsection (b).

"(2) Any health care provider designated or approved under paragraph (1) may not be employed on a regular basis by the employing agency.

"(d)(1) In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at its expense, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).

"(2) The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employing agency and the employee.

"(e) The employing agency may require that the employee obtain subsequent recertifications on a reasonable basis.

**"§ 6335. Job protection**

"An employee who uses leave under section 6332 or 6333 of this title shall be entitled, on return from the leave—

"(1) to be restored to the position of employment held by the employee when the leave commenced; or

"(2) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

**"§ 6336. Prohibition of coercion**

"(a) An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of the rights of the employee under this subchapter.

"(b) For the purpose of this section, 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation).

**"§ 6337. Health insurance**

"An employee enrolled in a health benefits plan under chapter 89 of this title who is placed in a leave status under section 6332 or 6333 of this title may elect to continue the health benefits enrollment of the employee while in leave status and arrange to pay into the Employees Health Benefits Fund (described in section 8909 of this title), through the employing agency of the employee, the appropriate employee contributions.

**"§ 6338. Regulations**

"The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regula-

tions prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1989.".

(2) The table of contents for chapter 63 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER III—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE

"6331. Definitions.
"6332. Family leave requirement.
"6333. Temporary medical leave requirement.
"6334. Certification.
"6335. Job protection.
"6336. Prohibition of coercion.
"6337. Health insurance.
"6338. Regulations.".

(b) EMPLOYEES PAID FROM NONAPPROPRIATED FUNDS.—Section 2105(c)(1) of title 5, United States Code, is amended by striking out "53" and inserting in lieu thereof "53, subchapter III of chapter 63,".

# TITLE III—COMMISSION ON FAMILY AND MEDICAL LEAVE

SEC. 301. ESTABLISHMENT.

(a) ESTABLISHMENT.—There is established a Commission to be known as the Commission on Family and Medical Leave (hereinafter in this title referred to as the "Commission").

SEC. 302. DUTIES.

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed policies relating to family leave and temporary medical leave; and

(B) the potential costs, benefits, and impact on productivity of such policies on employers;

(2) to the extent practicable, include in the study of family leave and temporary medical leave policies required under subsection (1)(A), a review of all studies of existing and proposed methods designed to provide workers with full or partial salary replacement or other income protection during periods of family leave and temporary medical leave that are consistent with the legitimate business interests of employers;

(3) within 2 years after the date on which the Commission first meets, submit a report to Congress that outlines the findings of the Commission.

SEC. 303. MEMBERSHIP.

(a) COMPOSITION.—

(1) APPOINTMENTS.—The Commission shall be composed of 12 voting members and 2 ex-officio members appointed not more than 60 days after the date of the enactment of this Act as follows:

(A) One Senator shall be appointed by the majority leader of the Senate, and one Senator shall be appointed by the minority leader of the Senate.

(B) One member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one member of the House of Representatives shall be appointed by the minority leader of the House of Representatives.

(C)(i) Two members each shall be appointed by—

(I) the Speaker of the House of Representatives,

(II) the majority leader of the Senate,

(III) the minority leader of the House of Representatives, and

(IV) the minority leader of the Senate.

(ii) Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor-management issues and shall include representatives of employers.

(2) EX-OFFICIO MEMBERS.—The Secretary of Health and Human Services and the Secretary of Labor shall serve on the Commission as nonvoting ex-officio members.

(b) VACANCIES.—Any vacancy on the Commission shall be filled in the same manner in which the original appointment was made.

(c) CHAIRPERSON AND VICE CHAIRPERSON.—The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) QUORUM.—Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

SEC. 304. COMPENSATION.

(a) PAY.—Members of the Commission shall serve without compensation.

(b) TRAVEL EXPENSES.—Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of title 5, United States Code, while performing duties of the Commission.

SEC. 305. POWERS.

(a) MEETINGS.—The Commission shall first meet not more than 30 days after the date on which all members are appointed. The Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) HEARINGS AND SESSIONS.—The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) ACCESS TO INFORMATION.—The Commission may secure directly from any Federal agency information necessary to enable the Commission to carry out this Act. On the request of the chairperson or vice chairperson of the Commission, the head of the agency shall furnish the information to the Commission.

(d) EXECUTIVE DIRECTOR.—The Commission may appoint an Executive Director from the personnel of any Federal agency to assist the Commission in carrying out the duties of the Commission.

(e) USE OF SERVICES AND FACILITIES.—On the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of the agency.

(f) PERSONNEL FROM OTHER AGENCIES.—On the request of the Commission, the head of any Federal agency may detail any of the personnel of the agency to assist the Commission in carrying out the duties of the Commission.

SEC. 306. TERMINATION.

The Commission shall terminate 30 days after the date of the submission of the final report of the Commission to Congress.

# TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. EFFECT ON OTHER LAWS.

(a) FEDERAL AND STATE ANTIDISCRIMINATION LAWS.—Nothing in this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or handicapped status.

(b) STATE AND LOCAL LAWS.—Nothing in this Act shall be construed to supersede any provision of any State or local law that provides greater employee family or medical leave rights than the rights established under this Act.

SEC. 402. EFFECT ON EXISTING EMPLOYMENT BENEFITS.

(a) MORE PROTECTIVE.—Nothing in this Act shall be construed to diminish the obligation of an employer to comply with any collective-bargaining agreement or any employment benefit program or plan that provides greater family and medical leave rights to employees than the rights provided under this Act.

(b) LESS PROTECTIVE.—The rights provided to employees under this Act may not be diminished by any collective-bargaining agreement or any employment benefit program or plan.

SEC. 403. ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES.

Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act.

SEC. 404. REGULATIONS.

Not later than 60 days after the date of enactment of this Act, the Secretary shall prescribe such regulations as are necessary to carry out title I.

SEC. 405. EFFECTIVE DATES.

(a) ADVISORY COMMISSION.—Title III shall become effective on the date of enactment of this Act.

(b) OTHER TITLES.—

(1) IN GENERAL.—Except as provided in paragraph (2), titles I, II, and IV shall take effect 6 months after the date of the enactment of this Act.

(2) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the effective date

described in paragraph (1), title I shall apply on the earlier of—

(A) the date of the termination of such agreement, or

(B) the date which occurs 12 months after the date of the enactment of this Act.

## II. Summary of the Bill

S. 345, the Family and Medical Leave Act of 1989, provides for a limited period of unpaid family leave to employees for the birth, adoption, or serious illness of an employee's child or for the serious illness of an employee's parent and unpaid medical leave for employees who are unable to perform the functions of their jobs due to their own serious illness. According to an independent analysis by the General Accounting Office, the total cost of this legislation to employers will be less than $236 million per year, which is the cost of continuing health insurance for employees on unpaid leave.

The Act covers employers who employ 20 or more employees at any one worksite for each working day during 20 or more calendar weeks in the current or preceding calendar year. To be eligible for leave, an employee must be employed by that employer for 12 months and not less than 900 hours. The Act covers 12 percent of U.S. employers and 47 percent of U.S. employees.

An employee is entitled to 10 weeks of unpaid family leave during any 24-month period upon the birth, placement for adoption or foster care, or serious health condition of the employee's son or daughter or parent. The employer may elect to substitute any of the employee's accrued paid leave for any part of the 10-week leave period. When the need for leave is foreseeable, the employee must provide reasonable prior notice, and make efforts to schedule leave so as not to disrupt unduly the employer's operations. An employer may also require an employee to report periodically during the leave period on the employee's leave status and intention to return to work. Spouses employed by the same employer are entitled to a total of 10 weeks of leave for the birth or adoption of a child.

An employee who is unable to perform the functions of his or her position because of a serious health condition is entitled to temporary unpaid medical leave not to exceed 13 weeks during any 12-month period. Medical leave is subject to conditions similar to family leave regarding the employer's substitution of paid leave for any part of the unpaid leave, reasonable prior notice, efforts not to disrupt unduly the employer's operations, and periodic reporting on the employee's status and intention to return to work.

An employer may require medical certification to support a claim for medical leave or leave to care for a seriously-ill child or parent. For medical leave, the certification must include a statement that the employee is unable to perform the functions of his or her position. For leave to care for a seriously ill child or parent, the certification must include an estimate of the amount of time the employee is needed to care for the child or parent. An employer may require a second medical opinion and periodic recertifications at its own expense. If the first and second opinions differ, the employer, again at its own expense, may require the binding opin-

ion of a third health care provider, approved jointly by the employee and the employer.

During family or medical leave, the employee's pre-existing health benefits are maintained. The employer is under no obligation to accrue seniority or other employment benefits during the leave period. Upon return from leave, the employee shall be restored to the same or an equivalent position. The taking of leave shall not result in the loss of any benefit earned before the leave nor shall it entitle the employee to any right or benefit other than that to which the employee was entitled on the date the leave commenced.

It is unlawful for any employer to interfere with or deny the exercise of any right provided under this Act.

The Act will be enforced by the Department of Labor. Any person alleging a violation of the Act may file a charge with the Secretary of Labor and, if necessary, receive an Administrative Law Judge ruling. The administrative ruling may be appealed to the U.S. Court of Appeals. A charging party may also bring a civil action in United States district court, unless the Secretary previously has approved a settlement agreement or issued a complaint. Relief in the event of a violation may include actual monetary damages and an additional amount equal to the actual monetary damages or consequential damages.

Title II of the Act extends coverage of the Act to federal civil service employees.

Title III establishes a bipartisan Commission on Family and Medical Leave with the purpose of conducting a comprehensive study of existing and proposed policies relating to family and medical leave and the potential benefits and costs of such policies for employers. The Commission will report its findings to Congress within 2 years of the date on which the Commission first meets.

Nothing in this Act shall be construed to affect any federal or state law prohibiting discrimination or any state or local law which provides greater family or medical leave rights than those established under this Act. The Act shall not be construed to diminish an employer's obligations under a collective bargaining agreement; nor may the rights provided under this Act be diminished by such an agreement. Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than those required in the Act.

The Act is based not only on the Commerce Clause, but also on the guarantee of equal protection and due process embodied in the Fourteenth Amendment.

The Act generally shall take effect 6 months after the date of enactment, except for Title III (the Commission) which shall take effect immediately. In the case of a collective bargaining agreement, the Act shall become effective upon termination of the agreement, but no later than 12 months after the date of enactment.

## III. Background and Need for Legislation

### INTRODUCTION

The purpose of the Family and Medical Leave Act of 1989 is to assist workers in balancing the demands of the workplace with the

needs of their families. The legislation simply provides workers with a limited period of job protection and continued health insurance coverage while they meet pressing family obligations related to the birth, adoption, or the serious illness of a child or the serious illness of a parent, or a worker's own serious illness. This legislation is essential if the nation is to address the dramatic changes that have occurred in the American workforce in recent years.

The demographic revolution in the workforce is having a profound effect on the lives of working men and women and their families. The once-typical American family, where the father worked for pay and the mother stayed at home with the children, is vanishing. Today, less than 10 percent of American families fits this classic model. The majority of American families are comprised of two-earner couples working outside the home.

Today, more than one-half of all mothers with infants under one year of age work outside the home. That figure has doubled since 1970, and the rate of increase shows no sign of abating. At present, women constitute forty-four percent of the workforce. By 1990, their workforce participation is expected to rise to at least 50 percent. Fifty-six percent of American women are now in the workforce, 80 percent of whom are in their prime childbearing years. According to the Bureau of Labor Statistics, 90 percent of fathers and more than 60 percent of mothers work outside the home. The mothers of 24 million children are working outside the home.

Women are in the workforce out of economic necessity. Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than $15,000 a year. Women are the sole parent in 16 percent of all families. In March 1988, there were approximately 13 million children living in more than 7.7 million single-parent families, about one-fifth of all American children. Nearly 6.7 million of these families were headed by mothers. The new economic reality is that today's families depend on a woman's income to survive.

While these work force changes have been a boon to American business, many American workers face difficult choices every day as they seek to balance family and workplace responsibilities. Presently, one-third of the 2.2 million people caring for the elderly are in the work force—37 percent take care of their parents—and more than half of the 45.4 million children in two-parent families have both parents in the work force. For too many American families, family crises such as the urgent need to care for an ill child or elderly parent present an untenable choice; millions of workers are denied the temporary leave necessary to meet their family obligations without losing their jobs in the process.

In addition to addressing the needs of American workers, this legislation will have a positive effect on the employers who upgrade their policies to conform with the national standard for family and medical leave. Based on the experiences of employers with such leave, the employers that institute leave will gain economically from higher employee productivity, retention of trained staff, and improved ability to attract qualified employees. Such gains can be expected to far outweigh the modest cost of continued health insurance estimated by the GAO to cost $4.35 per covered employee annually.

The United States is the only industrial country with no national parental leave policy. As surveys by Dr. Sheila Kamerman of Columbia University School of Social Work and by the International Labor Organization have documented, almost every country in the world mandates parental leave, including our most successful economic competitors in Western Europe and Asia. Other nations typically have requirements which go beyond S. 345 in terms of leave duration and income replacement. In Europe, 5 to 6 months of paid leave is the norm for new mothers. Even Japan, often behind European labor standards, provides 12 to 14 weeks of partially paid leave with full job guarantees.

### THE NEED FOR FAMILY LEAVE

The Subcommittee on Children, Family, Drugs and Alcoholism conducted seven hearings during the 100th Congress on similar parental and medical leave legislation. In addition, the Subcommittee conducted a hearing on February 2, 1989. There, the need for family leave, after the birth or adoption of a child, or to care for a seriously ill child or parent, and the effects of family leave on business were explored in further detail. At this hearing and at the seven Subcommittee hearings held in 1987 and 1988, witnesses testified on the difficulties they faced in attempting to meet the needs of their families and the demands of their jobs. Their experiences provide a human dimension on the need for a national policy on family and medical leave.

Many new parents have no guarantee that their jobs will be protected either when they are unable to work due to pregnancy, childbirth, or related medical conditions, or after childbirth or placement for adoption or foster care when they need to stay home to care for their infants. The Family and Medical Leave Act would address this problem in two ways. First, its provision of temporary medical leave would ensure that new mothers don't lose their jobs when they temporarily cannot work due to pregnancy- and childbirth-related disability (as part of ensuring that employees in general do not lose their jobs when they are temporarily unable to work because of a serious health condition). Second, its provision of family leave would ensure that new parents do not lose their jobs for a period to care for their infants.

The Committee heard testimony from several witnesses who had suffered because their employers did not have such policies. In Atlanta, Ms. Beverly Wilkinson told the Subcommittee of losing her job when she gave birth to her first child. For five years she had worked as a secretary for an Atlanta corporation that described itself as a "family oriented company". When her child was born, she took two weeks of vacation time and five weeks of maternity leave as permitted by the company policy. The week before she was due back for work, she received a call telling her that her job had been eliminated due to a departmental organization. In spite of her record of good performance reviews and her ability to perform other jobs at the large company, she was not offered another position.

Similarly, a television anchor from Portland, Oregon told the Subcommittee of being forced to choose between her job and her

newborn child. Ms. Rebecca Webb initially had an agreement with her employer for a three-month leave after childbirth. However, seven months into her pregnancy, the leave previously granted was rescinded. The company claimed that they did not want to set a precedent for maternity leave because there were four other pregnant women working at the time. With the maternity leave no longer available, Ms. Webb was forced to quit her job.

The experiences of Ms. Wilkinson and Ms. Webb are not atypical. In Atlanta, an advocacy organization for women office workers, Nine to Five, runs a job problem counseling hot line that receives approximately 100 calls per year from women who have been fired, harassed or forced out of jobs due to conditions related to pregnancy or maternity leave. As Atlanta Nine to Five director Cindia Cameron testified, "For most of these women, compassion is all that we have to offer. There is no federal agency and no lawyer to refer them to for help in getting their job, their income or their family stability back."

In the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings. According to a 1988 study directed by Roberta M. Spalter-Roth and Heidi Hartman of the Institute for Women's Policy Research, by the year after birth, the earnings of mothers were $1.40 an hour lower than those of women who did not give birth (although they had been higher before birth). The researchers attribute much of this earnings loss to the lack of job protection for the new mothers. As a result, this nation loses $715 million each year in foregone earnings and additional public assistance costs, more than three and a half times the estimated cost of this legislation. Eldercare also results in substantial earnings loss and increased public assistance costs. The cost of eldercare is estimated at $4.8 billion annually in lost income (mostly to women) and $37.9 million in public assistance payments to those caregivers unable to work due to their caregiving responsibilities for elderly dependents.

Adoptive parents also face difficulties in the absence of a reasonable family leave policy. Most adoption agencies require the presence of a parent in the home—some for as long as four months—when a child is placed with the family to allow them adequate time for proper bonding. When Ms. Catherine Hodge, a teacher in Los Angeles, adopted a child, she was only allowed one month of leave by her employer. She told the Subcommittee that more time would have been very helpful, especially in view of the boy's many physical and mental diabilities, and the difficulties she had in establishing a stable environment and integrating him into his new life. More time at the beginning, as well as a clear policy for later flare-ups of the child's illness, would have eased the difficulties that Ms. Hodge's family experienced in dealing with four hospitalizations and with arrangements for special education classes and other assistance for the boy in school. Without a family leave policy, both her company and her son suffered.

In his testimony, Mr. Joe Kroll of the North American Council on Adoptable Children stressed the need for job security during the important period of adjustment after the adoption of a special needs (or any) child. He stated that "Prospective adoptive parents will be more able to consider special needs adoptions if they know

they are not jeopardizing their jobs in the process * * * Thus, in exchange for job security, adoptive parents volunteer to love and care for a child who has been abandoned or neglected, and for whom the state would otherwise be responsible."

A tragic example of the need for job protection for parents when their children are seriously ill was provided by Mr. Thomas Riley. His son was diagnosed as having cancer when he was four and a half years old. During the illness and extensive treatments, Mr. Riley was hired as a supervisor at a jewelry manufacturing company with the expressed understanding that he would need and receive time to accompany his son to medical treatments. Over the next six months his son's condition deteriorated, and Mr. Riley somehow managed both to care for his son and work at least 50 hours a week. He took a total of six days off from work during this period, all of which were uncompensated. Shortly after his son died, Mr. Riley was fired for no apparent reason, and in spite of his incredible efforts to give the job everything he could. He spoke for himself and many others in saying:

> I have always worked hard for a living, and taken pride in providing for my family. There are millions of American fathers like me. I don't want any, or expect any, special favors from anyone, from my employers or the Government. But I don't think that parents should be forced to choose between caring for their children or keeping their jobs.

These many personal accounts of the importance of family leave are corroborated by experts in the fields of child development and pediatrics. Dr. Ed Zigler, Director of the Yale Bush Center on Child Development and Social Policy and former director of the Office of Child Development Policy at the then U.S. Department of Health, Education, and Welfare, testified in strong support of the legislation. The Yale Bush Center had convened a distinguished advisory committee to direct a two-year study of our nation's infant care situation and to evaluate the impact of the changing composition of the workforce on families with infants. The committee was particulary concerned about low-income working parents and parents with premature, disabled or severely-ill infants. The committee's primary recommendation was for an infant care policy that would allow employees an adequate period of time for parents to care for newborn or newly-adpoted infants and for mothers to recover from pregnancy and childbirth. Based on the committee's findings, as well as his thirty years of work related to children and family life, Dr. Zigler told the Subcommittee "While I do not feel this bill goes far enough, it is an absolutely necessary first step. * * * Parental leave is critical to the healthy development of children and families."

Another world-recognized specialist in early childhood development, Dr. T. Berry Brazelton, from Harvard University and Children's Hospital in Boston, also stressed the importance of infant-parent bonding during the first few months of a child's life. He urged that at least one parent have the opportunity to care for a newborn in order to create a strong foundation for the child's later development.

These comments about infant care were echoed by various prominent pediatricians speaking on behalf of the American Academy of Pediatrics. Dr. Esther Wender stated that during the initial period of infant-parent bonding "the child makes adaptations which enhance optimal physical and emotional growth." Many of the pediatricians also addressed the needs of children who are seriously ill, whose recovery is greatly enhanced by parental care. Dr. Stuart Siegel, head of the Division of Hematology and Oncology at Children's Hospital in Los Angeles testified that the prospects for long-term survival for children with life-threatening illnesses are much better when the parents are able to assist with the treatment. For example, parents must transport their children frequently to the hospital and be available to the children at home in order to monitor their condition and to administer some of the therapy. Unfortunately, he reported that in caring for over 2,000 children with cancer and serious blood diseases, he has—

> Encountered numerous instances where parents had to choose between bringing their child to the hospital for much needed medical treatment and evaluation versus losing their jobs. * * * In almost all cases, the employers were aware of the nature and severity of the illness that the parent was dealing with in their child, but nevertheless, the parent was still faced with this terrible choice.

Ms. Dot Holland, the Director of Social Work at Henrietta Egleston Hospital for Children in Atlanta, Georgia, pointed out that most hospitals expect at least one parent to stay in the hospital with a child most of the time. While this rooming-in contributes to the child's recovery, if the working parent with insurance chooses to stay at the hospital and loses his or her job, even when another job is obtained, there may no longer be insurance coverage for a chronically-ill child because of the exclusion of pre-existing conditions. The loss of insurance may in turn force the family to depend on welfare and mark the first step in the cycle of poverty, especially in a single-parent family. Ms. Holland testifed that although parental and medical leave legislation would not solve all the problems that the parents of their patients face, it will "help many families survive the crisis of a child's serious illness or the birth of a child emotionally intact and financially solvent."

Virtually the same policy considerations arise when a worker faces the serious illness of his or her own parent. The urgent need to deal with the serious illness of the parent often creates a crisis for the worker and the entire family; at this time a stable income, the assurance of a secure job, and the opportunity to take time off when necessary are at a premium for the worker with caregiving responsibilites. The Subcommittee heard testimony from a worker whose employer was not willing to provide the needed flexibility. Ms. Myra V. Guski, a medical technologist, was forced to choose between her dying 76-year-old father and her job when her employer refused to grant her request for temporary family leave:

> When my father's death was close, I asked my supervisor for a leave of absence. He flatly refused my request. I had no choice but to resign * * * Caring for a loved parent is difficult under the best of circumstances. * * * But my

> parents' need shouldn't have put my job in jeopardy. Had the Family and Medical Leave Act been law in 1983, I would not have asked to chose between my father and my job.

Ms. Guski is one of approximately seven million workers who care for the elderly, more than a third of whom are taking care of their parents. Three out of every four caregivers are women, and nearly one out of three are poor. For the 95 percent of elderly people not in nursing homes, the most critical factor in preventing or delaying placement is the existence of family care. In 1987, there were 27 million non-institutionalized elderly in the United States, with the elderly population growing faster than the rest of the population. This trend, coupled with the steady increase of women in the work force, foretells even greater need for work place policies that accommodate caregiving for the worker's parent.

In the absence of a national family leave policy, approximately 11 percent of caregivers presently are forced to quit employment or are fired because of their caregiving responsibilities, according to information provided to the Subcommittee by Dr. Robyn Stone of the National Center for Health Services Research and Health Care Technology Assessment. In addition, a recent survey, conducted for the American Association of Retired Persons and the Travelers' Companies Foundation, found that because of caregiving responsibilities, 38 percent of employed caregivers had to change from full-time to part-time work. According to the same survey, approximately 20 percent of working caregivers had their benefits, including health insurance, reduced.

### THE EXTENT OF EXISTING FAMILY LEAVE POLICIES

There is widespread consensus that the influx of women into the workforce has had a tremendous impact on the family structure. Experts recognize the importance of parental availability during childbirth, adoption or a child's serious illness, and the need for employment policies that recognize family responsibilities. Yet existing family leave policies fall short of meeting the needs of today's workers. While many employers do permit some type of leave under limited circumstances, a large proportion of employers have yet to adopt such policies.

Most employers limit their leave policies to the immediate period of physical disability related to childbirth. Many women have access to such maternity-as-disability leave, but the duration and the job protections vary widely, and "bonding" leave for infant care after disability is much more limited. Leave for fathers and for adoption is rarely available, and leave for a child's or elderly parent's serious illness is unusual. A 1988 study by Buck consultants reported that only 16 percent of employers have an ill-child policy and only 14 percent have an ill-parent policy. Whether or not health insurance coverage is continued during leave varies widely from employer to employer.

Because there is no single body of research that documents exactly how many employers provide the job security and continuation of health benefits that would be required by this legislation, the picture of existing policies must be pieced together from vari-

ous sources. A 1986 study by the U.S. Chamber of Commerce found that only 50 percent of the 700 firms surveyed had either a parental or disability leave plan. Of the firms with leave plans, only 31 percent routinely granted eight weeks or more of leave and most (57 percent) required employees to pay for continuation of their health benefits at this critical time. Only 33 percent of the firms with leave guaranteed workers the same or a similar job upon returning to work.

The most comprehensive study to date was compiled in 1987 by the National Council of Jewish Women's (NCJW) Center for the Child. The NCJW study surveyed 2,243 employers of all sizes in 100 communities across the country. The study found that 72 percent of employers with 20 or more employees and 51 percent of employers with fewer than 20 employees provided 8 weeks or more of maternity-as-disability leave. In addition, 38 percent of the larger employers provided some parental leave to mothers for infant care beyond the disability period.

A survey of 100 small and medium sized firms, conducted in 1981 by Sheila Kamerman and Alfred Kahn of the Columbia University School of Social Work, found similar gaps in parental leave policies. The study found that less than 40 percent of women received paid disability leave for the six to eight week recovery period after chidbirth. Eighty-eight percent of the companies provided "maternity" leave, but only 72 percent formally guaranteed the same or comparable job.

Many studies overstate the prevalence of parental leave policies because they focus on larger and self-selected employers. Even so, they confirm that leave is often limited to childbirth-related physical disability for women (distinct from infant care leave). Catalyst, a national non-profit research organization, conducted a survey of the policies of Fortune 1500 companies and issued its "Report on a National Study of Parental Leaves" in 1986. Catalyst found that some job-protected infant care leave (distinct from disabiiity leave) was offered to women at 51.8 percent of the responding companies. By contrast, only 37 percent of these companies extended parental leave rights to fathers and often on a more limited basis than to mothers, and only 27.5 percent of the respondents offered benefits to workers who adopt children.

A 1988 study for the Connecticut Task Force on Work and Family Roles refined the questions and therefore the results even further. Carefully distinguishing between maternity-as-disability leave and infant care leave, the study found that less than 10 percent of all firms provide infant care leave. For firms with fewer than 100 employees, less than 5 percent provide leave for infant care.

The most recent study on parental leave was conducted by the Bureau of Labor Statistics and was issued on April 4, 1989. The BLS survey finds that 33 percent of employees working in medium and large private businesses are provided "maternity leave" and 16 percent are covered by unpaid "paternity leave". Such leave is defined in the study as leave to care for a newborn child and does not include other kinds of leave such as leave for short-term disabilities and paid vacation, which also might be used for this purpose. The survey provides representative 1988 data for thirty-one million

workers in private nonagricultural establishments with 100 or more employees.

Some critics of the legislation have argued that the bill is unnecessary because employers will use cafeteria benefit plans voluntarily to provide family leave. However, there is no evidence that the flexible or cafeteria benefits approach will lead to greater availability of family leave. Very few workers are covered by flexible benefits plans. According to the Bureau of Labor Statistics, in 1988 only 5 percent of full-time employees were eligible for flexible or cafeteria benefits. This most recent survey shows no increase from the 5 percent of employees eligible for parental leave in 1986.

Such plans rarely encompass parental leave. Unpaid leave is not even reported in the benefit survey literature as a component of cafeteria plans. At the Subcommittee hearing on February 2, 1989, Ms. Dana Friedman, formerly with the Conference Board and now President of the Families and Work Institute, addressed the question of cafeteria plans. Based on her consulting with employers and on inquiries placed to major benefits companies, she testified that she knew of no companies which offer family leave as part of a cafeteria plan. Even short-term disability plans (generally analogous to the medical leave provisions of S. 345) were offered by only 12 percent of respondents to the 1986 Hewitt Survey on Flexible Benefits. Thus, when offered, family and medical leave is typically a core benefit to which all employees are entitled, not a variable option in a cafeteria plan. Based on available evidence, the Committee therefore concludes that there is little direct relationship between flexible benefit plans and family and temporary medical leave.

Finally, there are indications that the availability and scope of current family leave policies are severely limited for those in lower paying jobs. This is compounded by the reality that these workers have fewer resources available to deal with family crises. The NCJW study found that management and professional employees were more likely to receive employer contributions to health insurance during maternity disability leave than were blue collar workers. Similarly, when the Service Employees International Union surveyed their contracts for low wage private sector workers, they found that employers were not voluntarily implementing adequate leave policies. Only 54 percent of the contracts had provisions for four or more months of maternity leave, 26 percent provided for reinstatement to the same job upon return from work, and 11 percent continued health benefits for workers on leave.

### THE NEED FOR TEMPORARY MEDICAL LEAVE

In addition to family leave, S. 345 provides for up to 13 weeks per year of unpaid job protected leave and the continuation of any existing health insurance coverage during an employee's serious illness. The fundamental rationale for such a policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working. Medical leave is a necessity for American workers, especially for poor families. The serious threat to the employee's health is difficult enough to

deal with alone without adding the prospect of job loss and termination of health insurance at such a time.

The need for medical leave has become even more imperative with the demographic and workforce changes described earlier in this report. The number of two-earner families has increased by more than 50 percent since 1966. Two out of three women working outside the home today are either the sole providers for their children or have husbands who earn less than $15,000 a year. Twenty million workers today are either single heads of household or living alone. The proportion of families headed by a single parent has increased from 12.4 percent in 1960 to 20.1 percent in 1987. Job loss because of illness has devastating effects on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household. As Eleanor Holmes Norton testified:

> For the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition * * * can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family. Indeed, it is hard to understand how single parents, who have no choice but to work to support their families, have survived under the present system. For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary. The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leaves especially critical for minorities.

A compelling example of the harm inflicted when a seriously will employee is fired was recounted at Congressional hearings by Ms. Frances Wright. Despite 10 years of exemplary service as a retail manager of a clothing store in Virginia, she was fired after developing cancer of the colon. She initially needed approximately 12 weeks off for surgical procedures. Later, although she made every effort to accommodate the employer's needs by scheduling chemotherapy treatments on weekends (keeping work loss to one day), and although she had been absent from work in her ten years with the company only two other times (for a total of three weeks), she was fired. The two year interval before she was finally able to find new work was extremely difficult for her.

Subsequent events in the account of Ms. Wright reveal that companies that have fired workers with serious health conditions are perfectly able to take a more generous approach. When Ms. Wright's company was taken over by a new owner, she was hired back; and this time, when she had a recurrence of the cancer, she received five weeks of paid leave, and took her leave with the emotional and financial security of knowing her job was not at risk.

In her testimony before the Subcommittee, Ms. Barbara Hoffman, Vice-President of the National Coalition for Cancer Survivorship stressed the need for job protection for cancer patients who face termination due to their medical condition. According to Ms. Hoffman, approximately 25 percent of all cancer survivors, over one million Americans, experience some form of employment dis-

crimination solely because of their cancer history. In a Stanford University study of 400 cancer patients, six percent of the patients were terminated after treatment. Ms. Hoffman stated that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments."

A 1988 study entitled "Unnecessary Losses" confirmed the fact that workers who have been seriously ill suffer greater unemployment and decreased earnings in years following the illness than do other workers. The study, conducted by the Institute for Women's Policy Research, compared the economic circumstances of workers who either experienced or did not experience more than 50 hours of absence from their work because of illness. They found that two years after illness, the "ill" group had significantly lower incomes and hourly wages, were working significantly fewer hours, and suffered more hours of unemployment. The losses for black women and men were the highest. The study concludes that legislation such as S. 345 can be expected to reduce substantially these losses because workers who can go back to their former jobs will suffer less unemployment and earnings loss than they do now.

Many employers already recognize the value of job protection during illness. The Bureau of Labor Statistics study of medium and large firms in 1986 found that 48 percent provided at least 13 weeks of short-term disability. It should be noted that this is short-term disability insurance with some income replacement; thus the overall incidence of job protected leave can be assumed to be higher when unpaid leave is also taken into account. It is also noteworthy that in the states (New York, New Jersey, Rhode Island, California, Hawaii, and Puerto Rico) where temporary disability insurance is required by statute, the vast majority of employers have been providing these benefits with no reported adverse effects. Given this existing pattern of medical leave, compliance with S. 345 should not require major adjustments by employers, while providing much needed assistance to employees whose jobs and health insurance are otherwise at risk. The Committee, views this legislation as ultimately reducing the individual, family, employer, and societal costs of serious health conditions.

Another significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.

### IMPACT ON EMPLOYERS

For those employers providing family and medical leave, all indications are that the policy functions effectively and has little, if any, net cost. Their positive experiences serve as a road map for those not yet providing family and medical leave. In the Catalyst

study, 86 percent of respondents said that setting up a leave period and arranging for the continuation of benefits was relatively easy to do. The work of any leave-taker was handled primarily by rerouting it to others or, less frequently, by using a temporary replacement from inside or outside the company.

The Subcommittee received testimony from a wide range of employers that provide family and medical leave. Many of the witnesses testified in dual capacities, as small employers providing parental leave and as experts in other areas relevant to the legislation. From this testimony the Committee concludes that family leave is beneficial for both the employee and the employer. Mr. Geoffrey Carter, a small business owner, affirmed this conclusion in his testimony at the February 2, 1989 Subcommittee hearing:

> It has been my experience that the best policy is to provide the necessary leave and to plan accordingly. This is accomplished by spreading the workload and supporting the temporary leave with temporary employees. The cost of this alternative is short term, and the benefits of this policy command the respect and loyalty of all our employees.

Mr. David Warfield, Vice President of the Board of Trustees of Huntington Beach Union High School in California reviewed three decades of positive experience with parental leave in their school system:

> Over the past 30 years the district has had an average of four employees taking advantage of the maternity/adoption leave and/or utilizing paid sick leave benefits, less than 1 percent of the staff. * * * The district has experienced no major problems or hardships in conducting school business while employees were on maternity leave. The services of qualified substitutes have always been available so that the education of our young people has not been interrupted and the day-to-day functioning of the district has not suffered any detriment. The district has always cooperated in granting maternity/adoption leaves and including maternity disability under paid sick leave benefits because it has been the philosophy of the district to hire and retain the best qualified employees.

Ms. Jeanne Kardos, Director of Employee Benefits for the Southern New England Telephone company (SNET), summarized the company's ten years of experience with parental and medical leave. Leave policies at SNET include general medical leave, infant care leave for mothers and fathers (after the period of disability for mothers of newborns), leave for adoption, for a child's serious illness, and continuation of health insurance. Ms. Kardos testified that the leave policies are considered an asset by management and workers alike.

> We recognize that women with small children are in our workforce to stay. * * * These women are very highly trained. They have a tremendous amount of job experience, and we do not want to lose them. They have a special need that we have recognized. The need is parenting

> * * * We also have a very selfish reason. We regard these people as assets to the corporation. We have a lot invested in them * * * We think by having these kinds of benefit plans, we can attract the best people and keep them. * * * we think it is cost-effective rather than costly * * * [because] it serves productivity. We get people back who are not only highly trained and skilled in what they do, but we get them in such a way that they are very grateful to the company that cares for them, and they stay with us. Our average service in our company is very long.

Ms. Kardos' testimony is consistent with the findings of the 1986 Chamber of Commerce survey in which the most often cited reason for offering parental leave benefits was recruitment and retention (61 percent).

The GAO used existing employer practices to project the impact of this legislation on employers without family leave policies. According to the GAO's analysis and studies of firms with parental leave, S. 345 will have no measurable effect on workplace routines or productivity. After an intensive survey of 80 firms with leave policies in two metropolitan labor markets, GAO found that only 30 percent of workers are replaced. Instead, just as the Catalyst study found, employers tend to reallocate the work of those on leave to other employees. GAO also found that the cost of replacement workers is generally similar to or less than the cost of the worker replaced, and employers believe the replacement does not result in a significant loss of output. Based upon this survey, GAO estimated that the legislation will result in fewer than 1 in 275 workers being absent from work at any one time.

Thus, the GAO concluded that "[T]here will be little, if any measurable net costs to employers associated with a firm's method of adjusting to workers taking leave under this proposal." The cost of this legislation results exclusively from the continuation of health insurance for employees on unpaid leave. The GAO estimated that only 12 percent of employers and 47 percent of employees will be covered by S. 345. For employers, the annual cost per covered employee will average $4.35.

*GAO analysis of Family and Medical Leave Act*

| | |
|---|---|
| U.S. firms covered by legislation (percent) | 12 |
| U.S. employees covered by legislation (percent) | 47 |
| Total annual cost of legislation (millions) | <$236 |
| Annual cost per covered employee | $4.35 |

Some critics of S. 345 have argued that its implementation will result in employers' taking away other employee benefits. Such a benefit tradeoff is improbable in view of the low cost of unpaid family leave as compared to the typical fringe benefits package. For example, members of the Chamber of Commerce reported average expenditures in 1988 of $8,227 per employee for benefits (not including legally required benefits payments). To determine actual experience under similar circumstances, the Subcommittee invited the Commissioner of the Oregon Bureau of Labor and Industries to testify at the February 2, 1989, hearing about the state's experience with recently enacted family leave legislation. In preparation for her testimony, Commissioner Mary Wendy Roberts contacted

employers throughout the state and found that none of them had reduced other benefits when they came into compliance with the statutory family leave requirements. At the same hearing, Ms. Dana Friedman testified that in her extensive consulting with companies on the family leave policies, "there was absolutely no indication that there was a plan to cut back on other benefits".

To the contrary, employers are consistently positive about the effect of family leave on productivity, turnover, and training costs. It should come as no surprise, then, that at the Subcommittee's February 2, 1989 hearing, a top official of the major national business lobbying organization opposed to S. 345 could not name a single business or corporation which had reduced or eliminated other employee benefits when a voluntary or state-required family leave program was put in place.

### FEDERAL AND STATE RESPONSES

Absent passage of this legislation, employee rights to leave are established only through the Pregnancy Discrimination Act of 1978 (PDA) and state statutes. The PDA amended Title VII of the 1964 Civil Rights Act to classify pregnancy and childbirth as temporary disabilities and to require that women receive the same health insurance coverage, income and job protection as employees who incur other disabilities. In states where disability insurance is mandatory (New York, New Jersey, Rhode Island, California, Hawaii and Puerto Rico), pregnancy-related disabilities are covered by disability insurance. Many employers changed their maternity leave policies in the wake of PDA, developing standardized policies that treated the maternity disability period consistently with other disabilities. Although the PDA expanded the rights of pregnant women to childbirth-related disability leave, many gaps remain in policies regarding family and medical leave.

A number of states have statutes covering elements of the family and medical leave provided by S. 345. Eight states have recently passed family and/or medical leave legislation: Connecticut (for state employees), Maine, Minnesota, North Dakota (for state employees), Rhode Island, West Virginia (for state employees), and Wisconsin. Eleven states (California, Connecticut (for other employees), Hawaii, Iowa, Kansas, Louisiana, Massachusetts, Montana, New Hampshire, Tennessee, Washington) and Puerto Rico provide for maternity disability leave through statutes or through regulations issued pursuant to state anti-discrimination laws. However, only three states (Connecticut, Maine, Wisconsin) guarantee both family leave to care for a new child or seriously-ill child or parent and temporary medical leave for an employee's serious illness.

Even with the trend to enact policies to help working parents the vast majority of American workers are not covered by such legislation. In addition, a federal standard would avoid the inconsistencies created by differing state statutes. Currently, the right to job protection related to maternity could be "a reasonable period of time" or six weeks or four months, depending on the state in which the mother works. The present system is a patchwork of widely divergent laws, creating serious confusion and costs for interstate em-

ployers. This inefficiency would end with a minimum national standard.

### CONCLUSION

Because of profound demographic changes, a national standard for family and medical leave has become imperative. Existing employer policies and state statutes do not meet the needs of workers for job protection during periods of conflicting work and family demands. The Committee believes that this Act accomplishes the goal of assisting families with their dual responsibilities in a way that is fair to employers and employees alike. This legislation puts into place a national policy that is fair and equitable, as well as economically sound.

## IV. History of Legislation

### LEGISLATIVE ACTION IN THE 101ST CONGRESS

On February 2, 1989, Senator Christopher J. Dodd introduced S. 345, the Family and Medical Leave Act of 1989, a bill to entitle employees to unpaid leave in cases involving the birth, adoption or serious health condition of an employee's child or the serious health condition of an employee's parent. The bill also provides for temporary medical leave in cases involving an employee's inability to perform his or her job because of a serious health condition. Employers with 20 or more employees are covered by the legislation. The bill was referred to the Committee on Labor and Human Resources.

A hearing was conducted by the Subcommittee on Children, Family, Drugs and Alcoholism on February 2, 1989.

On April 19, 1989, the Committee on Labor and Human Resources ordered S. 345, as introduced, favorably reported. The Committee approved the bill by a roll call vote of 10–6.

### HEARING

A hearing on S. 345 was held by the Subcommittee on Children, Family, Drugs and Alcoholism of the Committee on Labor and Human Resources, on February 2, 1989, the following individuals provided testimony:

Dr. Esther Wender, American Academy of Pediatrics and Montefiore Medical Center, Bronx, New York;

Mr. Joe Kroll, Executive Director, North American Council on Adoptable Children, St. Paul, Minnesota;

Ms. Barbara Hoffman, Vice-President, National Coalition for Cancer Survivorship, Princeton, New Jersey;

Ms. Myra Guski, Seminole, California;

Mrs. Carol Ball, Ball Publishing Company, Arcanum, Ohio;

Ms. Mary Wendy Roberts, Commissioner, Oregon Bureau of Labor and Industries, Portland, Oregon;

Ms. Susan Ditto Hamilton, Owner/Operator, Martha McCools Restaurant, Tucumari, New Mexico;

Ms. Patricia Ashley, Benefits Manager, Methodist Hospital of Indiana, Indianapolis, Indiana;

Mr. Jeff Carter, President, Carter Communications, Liberty Corner, New Jersey;

Mr. John Motley, Director, Governmental Relations, National Federation of Small Business, Washington, D.C.; and

Ms. Dana Friedman, President, Families and Work Institute, New York, N.Y.

## V. Committee Views

### DEFINITIONS

The Committee intends the term "employer" to include any employer who employs 20 or more employees at any one worksite for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year. The 20 calendar work weeks need not be consecutive. However, in order for a work week to count toward the 20-week total, the employer must employ 20 or more employees as defined under section 102(3) during each work day in that work week. The Committee intends that the term "employer", as defined in Sec. 102(4), when applied to state and local government employers means any public agency as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C 203(x)). Federal employees are covered under Title II of the Act. Where an employer is in the business of supplying workers to multiple locations not owned or leased by said employer, all such locations shall be demed to be one "worksite" for purposes of this Act.

The threshold of 20 employees has the effect of exempting 88 percent of employers nationally from coverage. By state, the exemptions range from 85 percent to 91 percent. Nationally, 53 percent of workers are excluded from coverage, as a result of the 20-employee threshold and the 12-month and 900-hour qualifications. The Committee finds that any further increase in the threshold would deny too many workers the job security provided by the Act.

### FAMILY LEAVE

The bill provides for up to ten weeks of family leave over a two year period incident to the birth or placement for adoption or foster care of a child. Family leave may also be taken in order to care for a child or a dependent son or daughter over the age of eighteen who has a serious health condition. Finally, family leave may be taken to care for an employee's parent who has a serious health condition.

The phrase "in order to care for", in section 103(a)(1)(C), is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one else other than the child's parents who could care for the child. The same is often true for adult children caring for a seriously ill parent. Employees are thus assured the right to a period of leave to attend to their child's or parent's basic needs, both during periods of inpatient care and during periods of home care, when such child or parent has a serious health condition.

A father, as well as a mother, can take family leave because of the birth, adoption, foster care placement, or serious health condition of his child. Such leave generally may be taken at the same time, on an overlapping basis, or sequentially, as long as it is taken "because of" one of the circumstances specified in section 103(a). In the case of a newborn child it permits a mother to take family leave under section 103 after having taken childbirth-related medical leave under section 104. Section 103 makes it possible, among other things, for a father to take family leave during his wife's childbirth and recovery, an especially crucial time, whether the wife is a homemaker or an employee on temporary medical leave. More generally, it permits families to choose which parent will attend to extraordinary family responsibilities in light of the family's preferences, needs, career concerns, and economic considerations.

In the case of a placement for adoption or foster care, under section 103(a)(1)(B), leave may be taken upon the actual arrival of a child or may begin prior to arrival if an absence from work is required for such a placement to proceed.

The terms "son or daughter" in section 103 must be read in light of the definitions of those terms in section 102(12) of the bill. Many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. Increasingly, the people who care for children and who therefore find themselves in need of workplace accommodation for their child care responsibilities are the child's adoptive, step, or foster parents, or their guardians, or sometimes simply their grandparent or other relative or adult. This legislation deals with such families by tying the availability of "family" leave to the birth, adoption, or serious health condition of a "son or daughter", and then defining the term "son or daughter" to mean "a biological, adopted, or foster child, stepchild, legal ward, or child of a de facto parent" (Sec. 102(12).) In choosing this definitional language, the Committee intends that the terms "son or daughter" be broadly construed to ensure that the employees who actually have day-to-day responsibility for caring for a "son or daughter" or who have a biological or legal relationship to that "son or daughter" are entitled to leave.

An employee is also eligible for family leave to care for a son or daughter over 18 years of age if he or she has a serious health condition and is "incapable of self-care because of a mental or physical disability." (Sec. 102(12)(B).) The bill recognizes that in special circumstances, where a child has a mental or physical disability, a child's need for parental care does not end when he or she reaches 18 years of age. In such circumstances, parents continue to have an active role in caring for their sons or daughters over eighteen years of age. A dependent adult son or daughter who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under 18 years of age with a serious health condition. The nature of the son or daughter's serious health condition which would warrant leave under this provision would be similar to those warranting leave to care for sons and daughters under 18 years of age.

Section 103(a)(1)(C) also provides for a leave to care for the employee's parent who has a serious health condition. Under this provision, an employee could take leave to care for a parent of any age who, because of a serious mental or physical condition, is unable to care for his or her own basic hygienic or nutritional needs or safety. Examples include a parent whose daily living activities are impaired by such conditions as advanced Alzheimer's disease, stroke, severe clinical depression or who is recovering from major surgery or in the final stages of a terminal illness.

Family leave may be taken on a reduced leave basis only if agreed to by the employee and employer as set forth in section 103(b). Any reduced leave schedule agreed to shall not result in a reduction in the total amount of leave to which an employee is entitled. A "reduced leave schedule" is defined as "leave scheduled for fewer than the usual number of hours of an employee per workweek or hours per workday." (Sec. 102(9).)

The availability of reduced leave is crucial if the purposes of family leave are to be carried out in some instances. The leave provided by this bill is unpaid. As a practical matter, such leave is unavailable to those families who simply cannot afford to give up their income. If the choice is between full-time leave and no leave at all, these families, whose number is likely to be substantial, will be denied the important benefits of the leave. Reduced leave permits these families to experience some of the benefits of the bill while maintaining economic self-sufficiency. We anticipate that reduced leave will often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the weeks that the employee needs some leave.

Family leave under section 103 shares a number of statutory terms, definitions and ancillary provisions with temporary medical leave under section 104. Most centrally, section 103 grants parental leave to an employee for the care of a child who has a "serious health condition," a term defined for purposes of both sections 103 and 104 in section 102(10). Moreover, both sections 103 and 104 provide that leave taken in connection with a serious health condition may be taken "intermittently when medically necessary." (Sections 103(a)(3); 104(a)(3).) Both provisions require, where the need for leave is foreseeable, that the employee provide the employer with prior notice "in a manner which is reasonable and practicable," 103(e)(1), 103(e)(2)(B), 104(d)(1)(B); and that health treatment and supervision be scheduled so as not to disrupt unduly the operations of the employer. (Sections 103(e)(2)(A), 104(d)(1)(A).)

Finally, the certification requirement of section 105 applies not only to temporary medical leave under section 104, but also to family leave for serious health conditions under section 103(a)(1)(C). In each of these instances of common language or common provisions, the policies, concerns and interpretations discussed in connection with the temporary medical leave requirement apply to family leave as well.

Section 103(d)(1) and (2), governs situations where an employer has a policy of paid family leave and provides for the substitution of paid leaves of various kinds for the unpaid leave mandated by this legislation. The provision also has its parallel in section 104(c). Both provisions clarify that where an employer has a paid family

or temporary medical leave policy, the remainder of the statutory period (up to 10 workweeks for family leave, up to 13 workweeks for medical leave) may be unpaid. The provisions on substitution of other types of paid leave diverge with respect to the type of paid leave that may be substituted. While both permit the substitution of paid vacation leave, the family leave provision also allows substitution of paid personal leave and family leave while only the temporary medical leave provision allows substitution of paid sick leave or medical (temporary disability) leave, in cases where these apply to the condition in question.

As stated in section 104(c)(2) nothing in the Act requires an employer to provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave. For both family and medical leave, what is contemplated is that analogous paid leaves may be substituted for the bill's unpaid leave. This substitution will mitigate the financial impact of wage loss due to family or temporary medical leaves. Of course, the employer may not trade shorter periods of paid leave specified in subpart (2) of sections 103(d) and 104(c) for the longer periods prescribed by the Act. Read together, subsections (1) and (2) of 103(d) and 104(c) mean that an employee is entitled to the benefits of the shorter paid leave, plus any remaining leave time made available by the Act, on an unpaid basis. For example, if an employer provides 4 weeks of paid family leave, that employer shall make an additional 6 weeks of unpaid leave available so as to provide the total of 10 weeks required by this legislation.

Finally, section 103(f) provides a limitation on the right to take family leave when both spouses are employed by the same employer. Under section 103(f), if both spouses are employed by the same employer, the total amount of leave that the couple may take is limited to 10 weeks, except when such leave is needed to care for a seriously ill child. This provision is intended to prevent any employer from being penalized for or discouraged from employing married couples.

### MEDICAL LEAVE

Unpaid temporary medical leave is provided only for an employee who is "unable to perform the functions of the position of the employee" because of a "serious health condition." The definition of "serious health condition" in section 102(11) is intended to cover various types of serious physical and mental conditions which can prevent an employee from being able to perform his or her job.

The "serious health condition" definition is based on definitions in state temporary disability statutes, but is more narrow than those definitions. For example, the New Jersey statute defines a compensable disability as "any accident or sickness * * * resulting in the individual's total inability to perform the duties of employment", but does not further require hospitalization or continuing medical care. Similarly, the temporary disability statutes of New York, California, Rhode Island and Hawaii depend solely on an individual's inability to work. In Rhode Island, eligibility for TDI is based on a definition of "sickness" which states that: "An individual shall be deemed to be sick in any week in which, because of his

or her physical or mental condition, including pregnancy, he or she is unemployed and unable to perform his or her regular or customary work or services". (Gen. Laws of R.I. sec. 28-39-2(14)). In California, "an individual shall be deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her customary work." (65 Ann. Calif. Code sec 2626 (1985).

With respect to an employee, the term "serious health condition" is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery. Analogously, with respect to a child, the term "serious health condition" is intended to cover conditions or illnesses that affect the child such that he or she is similarly unable to participate in school or in his or her regular activities.

The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation included minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into "serious health condition" will be covered by the Act. It is intended that in any case where there is doubt whether coverage is provided by this Act, the general tests set forth in this paragraph shall be determinative. Of course, nothing in the Act is intended or may be construced to modify or affect any law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or handicapped status, as Section 401 clarifies.

Examples of serious health conditions include heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both. For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital. The patient also must be absent from work for more than a few days. Someone who has suffered a serious industrial accident may require initial lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter. A cancer patient may need to have periodic chemotherapy or radiation treatment, and a patient with severe arthritis may require periodic treatment such as physical therapy. A pregnant pa-

tient is generally under continuing medical supervision before childbirth, may require several days off for severe morning sickness or other complications, receives inpatient care for childbirth and several days thereafter, and is under medical supervision requiring additional time off during the recovery period from childbirth. The legislative history of the Pregnancy Discrimination Act established that the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery or other complications develop.

All of these health conditions require absences of more than a few days from work either for the condition or operation itself of for continuing medical treatment or supervision (e.g., physical therapy for accident victims or severe arthritis patients). Because continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor, section 104(a)(3) of the bill specifically permits an employee to take the leave "intermittently when medically necessary." Only the time actually taken is charged against the employee's entitlement.

The requirement concerning the employee's inability to perform his or her job functions due to a serious health condition contemplates inability caused either by the underlying condition or by the need to receive medical treatment or supervision for it. Someone requiring treatment or supervision that can be scheduled to accommodate the employer's convenience obviously may not have a condition which at the time of making the scheduling decision prevents the employee from performing the functions of the job (i.e. someone who needs a hernia operation or prenatal care or has early cancer). However, such an employee does need medical treatment or supervision and may require at some point to be absent from work to receive it, and hence is, at the time of receiving treatment or supervision, "unable to perform the functions of such employee's position." A narrower construction of the operative language of section 104, under which leave would be available only when the employee literally was so physically or mentally incapacitated that he or she could not work, would deny protection for leaves for treatment or supervision essential to avoid that very incapacity or facilitate recovery from it. Such a construction is contrary to common sense and would seriously undermine the purposes of the bill.

Section 104(d) of the bill accommodates an employer's needs in "any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision". This requires the employee to make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the employer's operations (subject to the approval of the employee's doctor or other health care provider) and in addition, to give the employer prior notice of the treatment or supervision in a manner which is reasonable and practicable. By "reasonable and practicable", the Committee intends for the employee whenever possible to inform the employer in clear terms (although not necessarily in writing) and sufficiently in advance for an employer to make suitable arrangements for the employee's leave so as to avoid undue disruption to the employer.

Nothing in this Act shall be construed to prohibit an employer and an eligible employee from actually agreeing to alternative employment for the employee throughout the period when the employee would be entitled to temporary medical leave under the Act. Performance in the alternate job, if agreed to, does not constitute use of the temporary medical leave.

Another provision designed to accommodate employer needs is found in section 105, concerning certification of the serious health condition. This provision is designed as a check against employee abuse of the temporary medical leave. Thus, the employer may require the employee to provide certification by the employee's own health care provider who, under section 102(6), can be a person licensed to provide health care services or someone determined by the Secretary of Labor to be capable of providing such services. The Secretary of Labor shall issue regulations determining those persons capable of providing health care services.

The required content of the certification parallels those already in general use by insurers and is to include the date on which the condition began, its probable duration, and the medical facts concerning the condition. In cases of medical leave, the certification must also state that the employee is unable to perform the functions of his or her position. In cases of family leave to care for a seriously ill child of parent, the certification must also contain an estimate of the amount of time the employee is needed to care for the child or parent.

Under section 105(c), if the employer has reason to question the original certification, the employer may, at its own expense, require a second certification from a different health care provider chosen by the employer. Such a health care provider may not be employed by the employer on a regular basis. In the event that the first and second opinions differ, the employer may, at its own expense, require a third opinion from the provider jointly designated or approved by the employer and the employee. The third option will be considered final and binding. Under section 105(e), the employer may require period recertifications. The certification shall, when possible, be provided in advance or at the commencement of the leave. If the need for leave does not allow for this, such certification should be provided reasonably soon after the commencement of the leave.

The Committee understands that the medical information that will be provided by employees in such medical certifications is often of an extremely personal nature. The Act establishes that the employee must provide such private information to the employer for the sole purpose of receiving the benefit guaranteed under this Act. This means that the employer may not divulge this private information to any other individual or entity, except where such disclosure may be necessary to carry out the purposes of this Act or where the employee has consented to such disclosure. The collection and use of this information should be consistent with the core principle of the Privacy Act of 1974: "Information collected for one purpose should not be disclosed for a differerent purpose without the individual's consent." Unauthorized disclosure would be an interference with or denial of the exercise of the rights provided under this title.

Under section 104(b), temporary medical leave may be unpaid, except to the extent that an employer already provides a paid temporary medical leave benefit whether through sick leave, temporary disability insurance coverage, or otherwise. Section 104(c)(1) permits an employer who provides paid temporary medical leave for a period of fewer than 13 work weeks a year, to provide the additional weeks of leave needed to attain the full 13 week leave on an unpaid basis. Section 104(c)(2) also permits either the employee or the employer to elect to substitute any of the employee's accrued paid vacation leave, sick leave, or medical leave for any part of the 13 week period, except that the employer is not required by this Act to provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave.

EMPLOYMENT AND BENEFITS PROTECTION

Under section 106, an employee taking either family or medical leave under this bill is "entitled, upon return from such leave," to restoration to his or her previous position or an "equivalent position with equivalent benefits, pay, and other terms and conditions of employment."

The Committee recognizes that it will not always be possible for an employer to restore an employee to the precise position held before taking leave. For instance, the employee's department may have been reorganized in his or her absence so that the precise job assignment no longer exists. On the other hand, employees would be greatly deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position. Accordingly, the bill contains an appropriately stringent standard for assigning employees returning from leave to jobs other than the precise positions which they previously held. First, the standard of "equivalence"—not merely "comparability" or "similarity"—necessarily requires a correspondence to the terms and conditions of an employee's previous position. Second, the standard encompasses all "terms and conditions" of employment, not just those specified. This standard for evaluating job equivalence under section 106(a)(1)(B) parallels title VII's standard for evaluating job discrimination in 42 U.S.C. sec. 2000e–2(a)(1), which prohibits "discriminat[ion] with respect to [an employee's] compensation, terms, conditions, or privileges of employment." For purposes of job equivalence, the Committee intends that the statutory language contained in section 106(a)(1)(B) of this Act shall be interpreted as broadly as similar language in section 703(a)(1) of Title VII.

Section 106(a)(2) makes explicit that an employer may not deprive an employee who takes leave of benefits accrued before the date on which the leave commenced. Nothing in the bill, however, should be construed to entitle an employee to the accrual of any seniority or benefits during any period of leave. Nor does this section entitle the restored employee to any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave. (Section 106(a)(3) (A) and (B). This means that, for example, that if an employee would have been laid off as a part of a larger

reduction in force, the employee has no special right to retain his or her job by virtue of having taken leave under this Act before layoff occurred. The employee's entitlement to be rehired is whatever it would have been had the employee not been on leave.

Under section 106(a)(4), the employer may have a formal company policy which requires all employees to obtain medical certification from the employee's healthcare provider that the employee is able to resume work.

Section 106(b) requires an employer to maintain health benefits during periods of family and medical leave at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously from the date of job restoration. Nothing in this section requires an employer to provide health benefits if it does not already do so at the time the employee commences leave. Section 106(b) is strictly a maintenance of benefits provision. It should be noted, however, that if an employer establishes a health benefits plan during an employee's leave, section 106(b) should be read to mean that the entitlement to health benefits would commence at the same point during the leave that the employee would have become entitled to such benefits if still on the job. Leave taken under this Act does not constitute a qualifying event under the continuation of health benefit provisions contained in Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272). However, a qualifying event may occur when it becomes known that an employee is not returning to employment and therefore ceases to qualify for health benefits under this Act.

MAINTENANCE OF HEALTH BENEFITS UNDER MULTIEMPLOYER PLANS

Section 106(b) of the bill requires an employer to maintain coverage under any group health plan for the duration of the employee's family or temporary medical leave. Coverge must be maintained at the level and under the conditions that coverage would have obtained had the employee remained on the job continuously from the date when the leave commenced until the date the employee is restored or, if earlier, the date on which his or her employment would have terminated. In the case of an employer that contributes to a multiemployer health plan (i.e., a health plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements), this requirement means that the employer by which the employee is employed when he or she takes the leave must continue contributing to the plan on behalf of that employee for the duration of the leave, as if the employee had continued in employment throughout the period of leave. This is the rule unless the plan expressly provides for some other method of maintaining coverage for a period of family or temporary medical leave. The employee's benefit rights shall continue to be governed by the terms of the plan.

Regardless of whether the employer's obligation to contribute to a multiemployer health plan on behalf of its employees exists by virtue of a collective bargaining or other agreement, the terms of a plan, or under a duty imposed by labor-management relations law, the employer, unless the plan expressly provides otherwise, shall

for the duration of the leave period be obligated to continue contributing as if the employee were not on leave. This obligation exists notwithstanding any terms of any collective bargaining or other agreement to the contrary, and the employee shall look to the plan for his or her benefit rights.

The Committee recognizes that multiemployer plans need to receive contributions to finance benefit coverage. To ensure that a plan receives employer contributions, the obligation to contribute imposed by the bill, like other statutory obligations imposed by current law, shall be considered an obligation enforceable under 29 U.S.C. sec. 1145 (relating to delinquent contributions to multiemployer plan). This is not intended to preclude any other means of enforcement that the plan may provide or be entitled to pursue. It simply vests a plan with an absolute right to invoke section 1145.

During this period of leave, the employer shall make contributions to the plan at the same rate and in the same amount as if the employee were continuously employed. Unless the contrary is clearly demonstrated by the employer (or by the plan, where appropriate), it shall be assumed that the employee would have continued working on the same schedule, at the same wage or salary, and otherwise under the same terms and conditions as he or she normally worked before going on leave. So, for example, if the employee normally worked 160 hours a month before taking family or temporary medical leave and the employer is obligated to contribute to a multiemployer health plan at the rate of $1.25 an hour, the employer would be obligated to continue contributing to the plan on behalf of the employee during the leave period at the rate of $1.25 an hour for 160 hours a month, unless the employer clearly shows that the employee would have worked fewer hours, or the plan clearly shows that the employee would have worked more hours, had he or she not been on leave.

A plan may adopt more specific rules governing an employer's contribution obligation during the leave period. For example, a plan may adopt a rule that an employee's normal number of work hours a month is the average number of work hours a month over the month (or a period of months) immediately prior to the employee's leave period. A plan could adopt rules which accommodate its particular reporting period (e.g., monthly, weekly). Also, the Committee intends that an employer shall provide the plan with whatever information is appropriate to assist the plan in determining an employee's status and whether the employer has an obligation to contribute on behalf of the employee.

The bill does not give an employee on family or temporary medical leave any greater rights or benefits under a multiemployer plan than an employee who is not on such leave. The same conditions of coverage shall apply to an employee on such leave as apply to an employee who is not on such leave from the employer. This includes any obligations and conditions with respect to employee contributions.

Finally, these obligations apply only with respect to an "eligible employee" within the meaning of section 102(3) of the bill; that is, an employee who has met the length of employment standard. Neither the employer nor the multiemployer plan has any obligation

under the bill with respect to persons who are not "eligible employees."

PROHIBITED ACTS

The Committee recognizes the possibility that an employer, in certain circumstances, may seek to induce an employee not to take the entitled leave or to retaliate against an employee for taking leave. The bill makes clear that an employer's interference with or attempts to restrain or deny the exercise of or the attempt to exercise any right provided by this Act is unlawful. This prohibition includes, but is not limited to, threats of reprisal or discrimination against any individual for opposing any practice made unlawful by this Act.

It is also unlawful for an employer to discharge or in any other manner discriminate against an employee because such employee has filed a charge, has instituted a proceeding under or related to the bill, has given or is about to give information in connection with any inquiry or proceeding relating to a right provided under this bill or has testified or is about to testify in any inquiry or proceeding relating to a right provided under this bill.

ADMINISTRATIVE PROVISIONS AND CIVIL REMEDIES

The temporary medical and family leave provisions are time specific in two important respects: first, there are limits on the duration of the leave once granted, and second, this right is effectively lost if not exercised in a timely manner. Accordingly, the bill contains an enforcement scheme designed to provide the most readily available and timely enforcement system possible. It is therefore, the clear intent of the Committee that all time requirements set forth in the bill be expeditiously met, and that evey effort be made to act expeditiously in resolving these cases.

The basic components of the Act's enforcement mechanisms are administrative investigation and hearings containing strict deadlines, alternative judicial enforcement, and the requirement of significant remedies for noncompliance. The availability of an administrative process means that aggrieved employees will have access to an already existing Department of Labor structure that is mandated to investigate and prosecute their claims. At the same time, the imposition of strict time deadlines for action will avoid many of the problems of delay and inaction that often plague administrative enforcement. It is the Committee's intent that all civil remedies apply to state and local government employees as well, including the right to sue their employers.

The relief provided is an equally important element of the enforcement process. In this regard, providing for the award of attorney's fees to prevailing parties will ensure both that attorneys will be willing to represent employees to assert their rights under the Act and that employers will be deterred from violating the provisions of the law. The Committee intends that attorney fee awards to prevailing parties will be made consistent with the standards set forth by the Supreme Court in *Christianburg Garment Company* v. *EEOC,* 434 U.S. 412 (1978). Similarly, the provision of mandatory money damages serves the dual purpose of (1) ensuring that em-

ployees will be recompensed for their actual losses and, within reasonable limits, for the pain and suffering in being denied leave and (2) adding to employers' incentives to comply. Actual losses include any actual expenses resulting from a denial of medical benefits in violation of the provisions of this Act. It is the Committee's intent that the relief authorized in this section be available against state and local employers to the full extent that is permitted under the Constitution.

An individual who believes he or she has been denied any of the rights guaranteed by the Act (including but not limited to restoration to the same or equivalent position following a temporary family or medical leave, or maintenance of health insurance benefits during the leave), may file a charge with an office of the Department of Labor or may bring a civil action to enforce the provisions of the Act. An administrative charge must be filed within one year of the violation. The Secretary of Labor must investigate the charge and make a determination within 60 days. If the determination is that there is a reasonable basis for the charge, the Secretary must issue and prosecute a complaint. An on-the-record hearing before an Administrative Law Judge ("ALJ") must begin within 60 days of the issuance of the complaint (unless the ALJ has reason to believe that the purposes of the Act would be best furthered by allowing more time to prepare for a hearing). The ALJ's findings, conclusions, and order for relief must be issued within 60 days of the completion of the hearing. The ALJ's decision becomes the final agency decision unless appealed and modified by the Secretary; the final agency decision may be reviewed in a federal court of appeals. If no such review is sought, the Secretary may petition the appropriate federal district court for enforcement of the final agency order.

An individual may commence a civil action without regard to whether a charge has been filed. Alternatively, if a charge has been filed, but the Secretary has dismissed or failed to take action on a charge within 60 days after filing, the individual who filed the charge may elect to file an action directly in federal or state court, instead of continuing with the administrative procedure.

A charging party may elect, before the commencement of the hearing, to be a party to the administrative proceeding initiated by the Secretary. This will allow the charging party to present evidence and testimony and to participate fully in the subsequent proceedings in the case. Such election does not, however, relieve the Secretary of his or her duty to prosecute the complaint.

At any time between the filing of a charge and the issuance of the ALJ's findings and conclusions, the parties may negotiate and agree to a settlement. Before the issuance of a complaint, any such agreement entered into by the charging party and the charged employer is effective, unless the Secretary determines within 30 days after notice of the settlement, that such is not consistent with the purposes of Title I. After the complaint has been issued, it is the Secretary's duty to prosecute the complaint and consequently any settlement agreement will be negotiated between the Secretary and the party charged. Such agreement may not be entered into over the objection of the charging party, unless the Secretary determines that the settlement provides a full remedy for the charging

party. In such cases, the Secretary shall provide the charging party with a succinct written statement explaining the reasons why the settlement agreement provides a full remedy for the charging party.

### COVERAGE OF CIVIL SERVICE EMPLOYEES

Title II extends the family and medical leave provided in Title I to federal civil service employees. The entitlement is identical with respect to employee benefits, including duration of the leave, circumstances for eligibility, continuation of health insurance, and job protection. The federal government as an employer enjoys the same protections and assurances that private sector employers are provided, including reasonable notice, substitution of paid leave, and procedures for certification of serious illness.

The enforcement provisions of Title II differ insofar as they are tailored to employment by the federal government. There exists the possibility that an agency manager, feeling pressure to complete certain job assignments, could coerce an employee not to take family or medical leave. Accordingly, an employer is prohibited from intimidating, threatening, or coercing, or attempting to intimidate, threaten or coerce any other employee for the purpose of interfering with the employee's right to job-protected family or medical leave. This includes, but is not limited to, promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation). This prohibition does not include consultations or discussions concerning the scheduling of family or medical leave for the purpose of minimizing the disruption of the operations of the employing agency.

Under the Civil Service Reform Act of 1978, the Special Counsel of the Merit Systems Protection Board is responsible for investigating certain violations of civil service laws. The Committee expects the Special Counsel to pursue aggressively any violation of this Act.

OPM is required to prescribe regulations necessary for the administration of the family and medical leave programs. These regulations must be consistent to the extent practicable with the regulations prescribed by the Secretary of Labor under Title I of this Act.

### COMMISSION ON FAMILY AND MEDICAL LEAVE

Title III of this Act establishes a bipartisan commission, to be known as the Commission on Family and Medical Leave, to conduct a comprehensive study of existing and proposed family and medical leave policies and the potential benefits, costs, and impact on productivity of such policies on businesses. The Commission will be composed of 12 voting members and 2 ex-officio members. The majority and minority leadership of the House of Representatives and the Senate shall each appoint one member of Congress to the Commission and two additional Commission members selected by virtue of their expertise in family, medical and labor-management issues, including small business representatives. The Secretary of

Health and Human Services and the Secretary of Labor shall serve as nonvoting ex-officio members.

It will be the task of the Commission to explore the relevant family and medical leave issues and options and to make recommendations to Congress within two years of its first meeting.

MISCELLANEOUS

Title IV of the Act contains miscellaneous provisions concerning the effect of this legislation on other legislation and on existing employment benefits, encouraging more generous leave policies, regulations, and effective dates. Section 401(a) generally provides that nothing in this Act shall be construed to modify or affect in any way any Federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or handicapped status. Thus, for example, nothing in this Act may be read to affect or amend Title VII of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000e et seq., as amended by Public Law 95–555, 92 Stat. 2076 (1987).

The bill is also not intended to modify or affect the Rehabilitation Act of 1973, as amended, or the regulations concerning employment which have been promulgated pursuant to that statute. Thus the leave provisions of this bill are wholly distinct from the reasonable accommodation obligations to employees who receive Federal financial assistance or who contract with the Federal government, or the obligations of the Federal government itself. Employees with disabilities who meet essential job requirements may request such job accommodations as job restructuring or the modification of equipment under the 1973 Act. See, e.q., 45 CFR Sec. 84.11 et seq. The purpose of this legislation is simply to apply the leave provisions of the bill to all employees and employers within its coverage, and not to modify already existing rights and protections.

Section 401(b) deals with state and local laws. It makes clear that any provisions of state and local laws conferring greater leave rights than those provided herein (assuming state and local compliance with all other Federal laws) may continue to exist. Thus, for example, if a state were to guarantee a longer period of family leave to all employees or to make it a paid leave, nothing in this Act could be read to supersede the state law.

Similarly, section 402(a) specifies that employers must continue to comply with collective bargaining agreements or employment benefits plans providing greater benefits than the Act. Conversely, section 402(b) makes clear that rights under the Act cannot be taken away by collective bargaining or employer plans.

Finally, section 404 provides that the Secretary of Labor may prescribe the necessary regulations for family and temporary medical leave, and section 405 sets forth the Act's effective dates. Generally, with two exceptions, the Act goes into effect six months after the date of enactment. However, the Title creating the commission goes into effect immediately; and where there is a collective bargaining agreement in effect on the date of enactment, Title I (providing the unpaid family and medical leave) goes into effect

on either the date the agreement terminates, or one year after the date of the enactment, whichever occurs earlier.

## VI. Cost Estimate

U.S. Congress,
Congressional Budget Office,
*Washington, DC, May 3, 1989.*

Hon. Edward M. Kennedy,
*Chairman, Committee on Labor and Human Resources,*
*U.S. Senate, Washington, DC.*

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 345, the Family and Medical Leave Act of 1989, as ordered reported by the Senate Committee on Labor and Human Resources on April 19, 1989.

*Estimated cost to the Federal Government.*—The estimated costs of Titles I, II, and III of the bill are discussed below. Title IV contains miscellaneous provisions that have no budgetary impact and effective dates for all Titles.

*Title I.*—Title I of S. 345 would allow a private sector employee, and any employee not covered under Title II, up to ten weeks' leave without pay during any 24-month period, because of the birth of a son or daughter. The placement of a child for adoption or foster care with the employee would also entitle the employee to this leave. In addition, an employee could claim this leave to care for a seriously ill son, daughter, or parent. Title I would also permit the employee up to 13 workweeks of temporary medical leave in every 12-month period due to a serious health condition preventing the employee from performing the functions of his or her position. Title I would not apply to any employer of less than 20 workers.

The direct costs of providing this leave would be borne entirely by the private employer, and therefore would not result in costs being incurred by the federal government. However, enactment of this bill would entail additional administrative costs for the Department of Labor (DOL). Costs would vary with the number of claims filed under S. 345. CBO assumes this Act would be administered directly through the DOL Wage and Hour Division.

The Wage and Hour Division works to obtain compliance with the minimum wage, overtime, child labor, and other employment standards, and we assume could administer this Act as well. This Division handles compliance actions for approximately one million people per year, as well as fulfilling its other administrative duties. Costs for this division are about $90 million annually. No data are available as to the estimated number of claims that would be filed under the Family and Medical Leave Act. Costs would vary not only with the caseload, but also with the manner in which the Department of Labor assures compliance with these provisions.

*Title II.*—Title II of S. 345 would allow federal civil service employees up to ten weeks of leave without pay during any 24-month period, because of the birth of a son or daughter. The placement of a child for adoption or foster care with the employee would also entitle the employee to this leave. In addition, an employee could claim this leave to care for a seriously ill son, daughter, or parent.

Title II would also permit an employee up to 13 workweeks of temporary medical leave in every 12-month period due to a serious health condition preventing the employee from functioning in his or her job.

We estimate that enactment of Title II of S. 345 would not significantly increase federal costs. The leave allowed under Title II is unpaid leave, and the employee would be responsible for the employee's share of any benefits they wished to keep in force. Under current law, there is no comprehensive federal policy covering unpaid leave for parental and medical purposes. The Office of Personnel Management provides guidelines for granting leave for various purposes, but implementation of leave policy is up to the discretion of each employee's supervisor.

It appears that Executive Branch employees who currently take leave without pay for purposes encompassed by S. 345 generally take it for periods of time shorter than authorized by the bill. Enactment of this bill could result in more leave without pay for affected federal civil service employees, although there is no basis for predicting how much additional leave would be taken. Whether this would increase federal costs depends on whether temporary replacements are hired and what salaries and benefits are paid. A General Accounting Office study of private firms' practices indicates that, in many cases, no temporary replacements are hired. No comparable information is available regarding federal civil service employees. Although some temporary workers would likely be hired to maintain operations, we assume that their salary would be at or below that of the permanent worker. Also, federal guidelines do not require that benefits be provided to temporary workers. Additional costs could result from providing benefits to the temporary worker, or from increased recruiting and personnel administration.

*Title III.*—Title III of this bill would establish the Commission on Family and Medical Leave to study existing and proposed policies on such leave, and the potential costs, benefits, and impact on productivity of such policies on employers. Travel expenses, per diem allowances, and salary and overhead costs for an executive director and staff are also authorized, although no specific authorization level is stated in the bill. We estimate these costs could be about $300,000 per year over the two-year life of the Commission. Costs of Title III most likely would begin late in fiscal year 1989 or in 1990, depending on the date of enactment.

Titles I, II, and IV of the bill would take effect six months after the date of enactment, while Title III would become effective upon enactment.

*Estimated cost to state and local governments.*—There is no data available for estimating the cost of S. 345 to state and local governments. They would be responsible for any costs associated with providing their employees with the leave specified in Title I. These costs could vary with the frequency and duration of leave taken, and with the type and number of replacement personnel needed. However, by the end of 1988 five states had enacted their own parental or family leave laws, and at least 14 states have similar legislation pending. Therefore, in these states, S. 345 may have less of

an effect on state and local government costs than in those states with no similar legislation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Pogue (226–2820).

Sincerely,

ROBERT D. REISCHAUER,
*Director.*

## VII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 345 is made:

### A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 345 would regulate every private and public sector employer with 20 or more employees at any one worksite. This number is estimated as approximately 681,000 establishments. Employees who have worked there at least one year and 900 hours for that employer would be eligible for leave under the Act. This number is estimated as approximately 54 million employees. Those not regulated would be all employers with fewer than 20 employees.

### B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS AND BUSINESSES AFFECTED

Individuals will have their jobs protected and their health insurance coverage maintained during the unpaid family and medical leave. The risk of unemployment will be reduced for individuals who, without S. 345, would have lost their jobs. Similarly, those would could have found new jobs only at lower pay rates will maintain their previous rates of pay upon return from leave. According to a recent study by the Institute for Women's Policy Research employed women who gave birth and do not have family leave lose an estimated $607 million in earnings annually, much of which will be saved as a result of this bill. Cost savings will also accrue to individuals on leave as a result of their health insurance being maintained.

There is no evidence of economic impact on consumers as a result of S. 345. Costs to consumers cannot be expected increase or decrease since the additional costs to employers are minimal [estimated by GAO as $4.35 per year covered employee] and since there is no evidence of greater business losses where state laws require similar family and medical leave.

The General Accounting Office study of this legislation concluded that there will be no measurable net costs to business from replacing workers or lost productivity. The GAO study concludes that the cost of S. 345 to employers will be less than $236 million annually. This cost results excessively from the continuation of health insurance coverage for employees on unpaid leave.

### C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The Committee believes that this legislation has no significant impact on personal privacy. The right of an employer under Sec-

tion 105 to require certification of serious illness is in keeping with practices commonly associated with disability insurance or sick leave programs. Employer abuse of privacy is precluded by the Section 107 prohibition against interference with an employee's exercise of his or her rights. In addition, employer use of private information must be consistent with the Privacy Act of 1974 requirement that information collected for one purpose not be disclosed for a different purpose without the individual's consent.

#### D. ADDITIONAL PAPERWORK, TIME AND COSTS

The bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation and enforcement of the Act. It is difficult to estimate the volume of additional paperwork necessitated by the Act, but the Committee does not believe it will be significant.

## VIII. SECTION-BY-SECTION ANALYSIS

*Section 1. Short title; table of contents*

This section designates this Act as the Family and Medical Leave Act of 1989 and sets out the table of contents.

### TITLE I—GENERAL REQUIREMENTS FOR FAMILY LEAVE AND MEDICAL LEAVE

*Section 101. Findings and purposes*

Congress' findings are that the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly; it is important for parents to be able to participate in early childrearing and the care of their children with serious health conditions; the lack of employment policies to accommodate working parents forces many individuals to choose between job security and parenting; and there is inadequate job security for employees whose serious health conditions temporarily prevent them from working.

The purposes of this Act are to balance the demands of the workplace and the needs of families; to entitle employees to take reasonable leave, for family or medical reasons; and to accommodate the legitimate interests of employers.

*Section 102. Definitions*

This section defines certain terms for purposes of the Act. Those definitions specifically referenced to the Fair Labor Standards Act are to be interpreted similarly under this Act. Such terms include:

Eligible employee—means any employee as defined in section 3(e) of the FLSA who is employed by the employer with respect to whom benefits are sought for not less than 12 months and not less than 900 hours over the previous 12 month period, except for Federal officers or employees covered under Title II of this Act.

Employer—means any person engaged in commerce who employs 20 or more employees at any one worksite during 20 or more calendar weeks in the current or preceding calendar year; any successor in interest of an employer; and any public agency defined under section 3(x) of the FLSA.

Serious health condition—means an illness, injury, impairment, or physical or mental condition which involves inpatient care in a hospital, hospice, or residential health care facility; or continuing treatment or supervision by a health care provider.

*Section 103. Family leave requirement*

An employee is entitled to 10 weeks of family leave during any 24 month period upon the birth, placement for adoption or foster care, or serious health condition of an employee's son or daughter or parent. The entitlement to leave upon the birth or placement of a child expires at the end of the 12 month period after such birth or placement. Leave for a parent's or child's illness may be intermittent when medically necessary. Leave may be taken on a reduced leave schedule upon agreement between the employer and the employee.

Family leave may be unpaid. The employee or employer may elect to substitute any accrued paid vacation leave, personal leave, or other appropriate paid leave for any part of the 10 week period and such may be reduced from the 10 week period. When the need for leave is foreseeable based on an expected birth or adoption, the employee shall provide reasonable prior notice. When the need for leave is foreseeable based on planned medical treatment or supervision, the employee shall provide reasonable prior notice and make a reasonable effort to schedule leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider.

When a husband and wife entitled to family leave are employed by the same employer, the aggregate period of family leave may be limited to 10 weeks, except in the case of a seriously-ill child.

*Section 104. Temporary medical leave requirement*

An employee unable to perform the functions of his or her position because of a serious health condition is entitled to temporary medical leave not to exceed 13 weeks during any 12 month period.

Medical leave may be unpaid. If the employer provides paid temporary medical leave or sick leave, such may be subtracted from the 13 weeks and either the employee or employer may elect to substitute accrued paid vacation leave, sick leave or medical leave for any part of the 13 week period. When the need for leave is foreseeable based on planned medical treatment or supervision, the employee shall provide reasonable prior notice and make a reasonable effort to schedule leave so as not to disrupt unduly the employer's operations, subject to the approval of the employee's health care provider.

*Section 105. Certification*

An employer may require that a claim for leave be supported by medical certification stating: (1) the date on which the serious health condition commenced, (2) the probable duration, and (3) the medical facts within the provider's knowledge regarding the condition. For purposes of medical leave, the certification also shall state that the employee is unable to perform the functions of his or her position. For purposes of family leave to care for a seriously ill child or parent, the certification shall include an estimate of the

amount of time that the employee is needed to care for the child or parent. The employer may require, at its own expense, a second medical opinion and periodic recertifications. Should the first and second opinions differ, the employer may require at its own expense, the opinion of a third jointly approved health care provider, whose opinion shall be binding.

*Section 106. Employment and benefits protection*

This section entitles any employee upon the return from leave to be restored to the same or an equivalent position.

The taking of leave shall not result in the loss of any benefits earned before the leave. Nothing in this section shall entitle any employee to any right or benefit to which the employee would not have been entitled had the employee not taken leave.

The employee's pre-existing health benefits shall be maintained during any leave.

*Section 107. Prohibited acts*

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under this title.

*Section 108. Administrative enforcement*

This section authorizes the Secretary of Labor to issue such rules and regulations as are necessary to carry out this section.

Anyperson alleging an act of violation of this title may file a charge with the Secretary. A charge must be filed within 1 year after the last event constituting the alleged violation.

The Secretary has 60 days to investigate the charge and either issue a complaint or dismiss the charge. The Secretary and the respondent may enter into a settlement agreement concerning a complaint, except that such agreement shall not be entered into over the objection of the charging party, unless the Secretary determines that the settlement provides full remedy to the charging party.

If at the end of the 60 day period, the Secretary has not (1) issued a complaint, (2) dismissed the charge, or (3) entered into or disapproved a settlement agreement, the charging party may bring a civil action as provided under this title. Such election shall bar further administrative action by the Secretary.

An admiistrative law judge shall commence a hearing within 60 days of the issuance of the complaint. The decision of the administrative law judge shall become the final decision of the agency unless appealed by an aggrieved party within 30 days or the Secretary modifies or vacates the decision, in which case the decision of the Secretary is the final decision.

Any person aggrieved by a final order may obtain review in the U.S. court of appeals within 60 days after entry of the final order.

*Section 109. Enforcement by civil action*

Either an employee or the Secretary may bring a civil action against any employer to enforce the provisions of this title in any appropriate U.S. or state court of competent jurisdiction. A civil action may not be commenced if the Secretary has approved a settlement agreement or issued a complaint.

No civil action may be commenced more than 1 year after the date of the last event constituting the alleged violation.

*Section 110. Investigative authority*

This section provides the Secretary with investigative authority as empowered under section 11(a) of the FLSA.

*Section 111. Relief*

An employer found in violation is liable to the injured party for any wages, salary, employment benefits, or other compensation denied to such employee, with interest, and an additional amount equal to the greater of either (1) the above amount or (2) consequential damages, not to exceed 3 times the amount determined above, but not to accrue prior to 2 years before action is brought.

The court may in its discretion reduce the amount of liability of any employer found to have violated this title upon proof that the employer acted in the reasonable and good faith belief that it was not violation of this title.

The prevailing party, other than the United States, may be awarded reasonable attorney's fees.

*Section 112. Notice*

Each employer shall post a notice setting forth the pertinent provisions of this title. Any employer who willfully violates this section is liable up to $100 for each offense.

TITLE II—FAMILY AND TEMPORARY MEDICAL LEAVE FOR CIVIL SERVICE EMPLOYEES

This title extends coverage of the Act to federal government employees.

TITLE III—COMMISSION ON FAMILY AND MEDICAL LEAVE

*Section 301. Establishment*

This section establishes the Commission on Parental and Medical Leave.

*Section 302. Duties*

The Commission shall conduct a comprehensive study of existing and proposed policies on family and medical leave and the costs, benefits, and impact on productivity of such policies on employers. The Commission shall submit a report to the Congress within 2 years.

*Section 303. Membership*

The Commission shall be composed of 12 voting members and 2 ex-officio members: 1 senator appointed by the Senate majority leader, 1 senator appointed by the Senate minority leader; 1 member of the House of Representatives appointed by the Speaker of the House of Representatives, 1 member of the House of Representatives appointed by the minority leader of the House of Representatives; and 8 additional members, 2 appointed by each of the above. Such members shall be appointed by virtue of demonstrated expertise in family, temporary disability an labor-management

issues and shall include representatives of employers. The Secretary of Health and Human Services and the Secretary of Labor shall serve as nonvoting ex-officio members.

*Section 304. Compensation*

The Members of the Commission shall be unpaid.

*Section 305. Powers*

The Commission shall meet within 30 days of appointment and shall hold such hearings as appropriate. The Commission may obtain from any federal agency information necessary to enable it to carry out this Act. The Commission may request use of the facilities, services, or personnel of any Federal agency to assist in carrying out its duties.

*Section 306. Termination*

The Commission shall terminate 30 days after the date of the submission of its final report to the Congress.

TITLE IV—MISCELLANEOUS PROVISIONS

*Section 401. Effect on other laws*

Nothing in this Act shall be construed to affect any federal or state law prohibiting discrimination or any state law which provides greater family or medical leave rights.

*Section 402. Effect on existing employment benefits*

Nothing in this Act shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished by such agreement or plan.

*Section 403. Encouragement of more generous leave policies*

Nothing in this Act shall be construed to discourage employers from adopting policies more generous than required under this Act.

*Section 404. Regulations*

The Secretary shall prescribe such regulations as are necessary to carry out title I.

*Section 405. Effective dates*

This act shall generally take effect 6 months after the date of enactment. In the case of a collective bargaining agreement, the Act shall take effect upon the termination of the agreement, but no later than 12 months after enactment. The Commission on Family and Medical Leave shall take effect on the date of enactment.

## IX. Committee Action

On April 19, 1989, the Chairman of the Committee on Labor and Human Resources, Senator Kennedy, convened an Executive Session of the Committee to consider S. 345.

The Committee rejected an amendment offered by Senator Coats for a sense of the Senate resolution regarding incentives to encourage employers to provide family leave, by roll call vote, 7–9.

| YEAS | NAYS |
|---|---|
| Hatch | Kennedy |
| Kassebaum | Pell |
| Coats | Metzenbaum |
| Thurmond | Matsunaga |
| Durenberger | Dodd |
| Cochran | Simon |
| Jeffords | Harkin |
| | Adams |
| | Milulski |

The Committee voted to adopt and report S. 345 with no amendments by roll call vote, 10–6.

| YEAS | NAYS |
|---|---|
| Kennedy | Hatch |
| Pell | Kassebaum |
| Metzenbaum | Coats |
| Matsunaga | Thurmond |
| Dodd | Durenberger |
| Simon | Cochran |
| Harkin | |
| Adams | |
| Mikulski | |
| Jeffords | |

## X. MINORITY VIEWS OF SENATORS COATS, THURMOND, HATCH, KASSEBAUM AND COCHRAN

As we address the problems we find with S. 345, we wish to make it abundantly clear that we are strong supporters of the concept of providing leave for family and medical purposes. The primary difficulty we have with this legislation is that it proposes to mandate a national leave policy which we believe will reduce overall employee benefits as employers are forced to eliminate voluntary benefits in order to pay for tne new family and medical leave requirements; burden employers, especially small businesses, with the costs of mandated leave regardless of their ability to absorb such costs; and create a vast new federal bureaucracy to administer and enforce this mandated leave policy. Our view is that family leave is desirable and should be encouraged through a policy of providing incentives and lfiting legal restrictions whoch will enable more employers to provide family and medical leave, thereby preserving the elements of choice and flexibility inherent in the successful employer-employee relationship that has been the foundation of our free enterprise system.

America is fast becoming a society in which nearly everyone works. Today over two-thirds of the Nation's adult women are in the workforce, and over half of the mothers with children are employed full-time. We have some 29 million two-income families with 25 million women. According to Workforce 2000 and other labor studies, two-thirds of the new entrants into the workforce between now and the end of this century will be women, most of them in their child-bearing years, and two-thirds of all preschool children will have mothers working outside the home. Clearly, one of the tasks we face is to reconcile the conflicting needs of women, work and families.

Working parents should not be forced to choose between careers and families. They need to be able to contiue to hold their jobs and earn income to support their families, while at the same time raise their families, have babies, tend to their children's needs, and care for sick infants and ailing parents. Balancing is required so that family needs and the demands of the workplace are both accommodated.

Granting family and temporary medical leave is an admirable idea whose time has come. It should be encouraged in the workplace. To remain competitive in the job market, to recruit and retain good employees, and to improve productivity, particularly in a time of growing labor shortages, employers will want to offer more attractive benefits. Family and medical leave will help to alleviate the concerns of working men and women with young children and aging parents. Such benefits will also ease the transition from welfare to work for low-income and disadvantaged families. In our view, every effort should be made—short of federal mandate—

to encourage more and more employers to include family and medical leave among the benefits they provide their employees.

The practical problems and costs associated with mandating family leave are considerable. Congress cannot properly and adequately determine and regulate the individual needs of workers and their families. Government should not force its judgment concerning such needs onto the employer-employee relationsip. It is one thing for employers to decide to offer employees a package of benefits which includes family leave. It is quite another for the Federal government to dictate what benefits an employer must provide and to whom and unde what conditions.

Keep in mid that if the Congress compels an employer to provide a particular benefit the total package of benefits is not thereby enlarged. Instead, it may necessitate the removal or reduction of some other benefits—benefits that employees may prefer. Whe employer are able to offer a wide array of benefits, the individual employee can select the kind of benefit most suitable to his or her needs. The growing trend toward more flexible benefit programs in the workplace will be constrained by mandating family and medical leave, much to the detriment of those employees who do not need or desire such leave.

For small business the total costs of mandated leave would be incalculable. The most dynamic sector of our economy is dominated by America's 18 million shall and entrepreneurial firms, which annually create most of the new jobs. Yet many of these small businesses struggle to survive and remain competitive. Without some incentive or relief, they would be forced to bear the brunt of the costs of mandated leave. At the 1986 White House Conference on Small Business, this issue was the number two priority concern of the 1800 delegates—of whom over 600 were business women—who voted overwhelmingly to urge Congress to reject mandated benefits, including parental leave.

As a practical matter, more women than men will take advantage of family leave. Thus, mandated leave would be especially costly for small firmsa which employ a majority of women. This will almost certainly lead to a loss of employment opportunities for young women of child-bearing age, as well as low-skilled or marginal workers and teenagers, whose jobs will be sacrificed to pay for these added benefits.

We are concerned by the growing trend we perceive in the Congress toward mandating benefits. It is now a widely accepted proposition that we can no longer afford to create gigantic new federal spending programs because they add to the budget deficit and fuel inflation. However, the supporters of S. 345 seem to be arguing that, rather than authorize certain new benefits that the people should need—even if there is no clear evidence that they want them—Congress can simply mandate that business provide these benefits, at their own expense, without costing the U.S. Treasury any more than the cost of policing and regulating these programs. Proponents of this approach overlook the European experience with mandated benefits, which is that they have contributed significantly to economic stagnation. We should think long and hard before embarking on a policy which would reduce our competitiveness and result in the loss of American jobs.

In summary, we believe that encouraging the expansion of family and medical leave is a good idea. It is good business policy; it is good family policy. that is why we endorse the idea of providing incentives for encouraging the adoption of family leave programs, retaining the choice and flexibility inherent in sound benefits policy. At the same time we should reexamine and reform those statutes and regulations which restrict the ability of working parents to spend more time with their families. For instance, some wage and hour laws need to be amended to permit more flextime and comptime, and homework regulations at home. That is the essence of the Coats amendment to S. 345, which failed on a strictly party line vote in the committee mark-up. But mandating family leave benefits, as S. 345 would do, will be costly, especially for small business, and counterproductive, especially for women in the workforce. This makes no sense.

DAN COATS.
STROM THURMOND.
ORRIN G. HATCH.
NANCY LANDON KASSEBAUM.
THAD COCHRAN.

## XI. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

# UNITED STATES CODE

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# TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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## PART III—EMPLOYEES

### Subpart A—General Provisions

CHAPTER 21—DEFINITIONS


Sec.
2101. Civil service; armed forces; uniformed services.
2101a. The Senior Executive Service.
2102. The competitive service.
2103. The excepted service.
2104. Officer.
2105. Employee.
2106. Member of Congress.
2107. Congressional employee.
2108. Veteran; disabled veteran; preference eligible.
2109. Air traffic controller; Secretary.


* * * * * * *

**§ 2105. Employee**

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

(b) An individual employed at the United States Naval Academy in the midshipmen's laundry, the midshipmen's tailor shop, the midshipmen's cobbler and barber shops, and the midshipmen's store, except an individual employed by the Academy dairy, is deemed an employee.

(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—

(1) laws (other than subchapter IV of chapter [53] *53, subchapter III of chapter 63,* and sections 5550 and 7204 of this title administered by the Office of Personnel Management; or

(2) subchapter I of chapter 81 and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

(d) A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

(e) Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title.

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## Subpart E—Attendance and Leave

### CHAPTER 63—LEAVE

#### SUBCHAPTER I—ANNUAL AND SICK LEAVE

Sec.
6301. Definitions.
6302. General provisions.
6303. Annual leave; accrual.
6304. Annual leave; accumulation.
6305. Home leave; leave for Chiefs of Missions; leave for crews of vessels.
6306. Annual leave; refund of lump-sum payment; recredit of annual leave.
6307. Sick leave; accrual and accumulation.
6308. Transfers between positions under different leave systems.
[6309. Repealed.]
6310. Leave of absence; aliens.
6311. Regulations.
6312. Accrual and accumulation for former ASCS county office employees.

SUBCHAPTER II—OTHER PAID LEAVE

6321. Absence of veterans to attend funeral services.
6322. Leave for jury or witness service; official duty status for certain witness service.
6323. Military leave; Reserves and National Guardsmen.
6324. Absence of certain police and firemen.
6325. Absence resulting from hostile action abroad.
6326. Absence in connection with funerals of immediate relatives in the Armed Forces.

*SUBCHAPTER III—PARENTAL LEAVE AND TEMPORARY MEDICAL LEAVE*

*6331. Definitions.*
*6332. Parental leave requirement.*
*6333. Temporary medical leave requirement.*
*6334. Certification.*
*6335. Job protection.*
*6336. Prohibition of coercion.*
*6337. Health insurance.*
*6338. Regulations.*

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## *SUBCHAPTER III—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE*

### *§ 6331. Definitions*

*For purposes of this subchapter:*

*(1) "employee" means—*

*(A) an employee as defined by section 6301(2) of this title (excluding an individual employed by the government of the District of Columbia); and*

*(B) an individual under clause (v) or (ix) of such section;*

*who has been employed for at least 12 months and completed at least 900 hours of service during the previous 12-month period.*

*(2) "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—*

*(A) inpatient care in a hospital, hospice, or residential medical care facility; or*

*(B) continuing treatment, or continuing supervision, by a health care provider;*

*(3) "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a de facto parent, who is—*

*(A) under 18 years of age; or*

*(B) 18 years of age or older and incapable of self-care because of mental or physical disability; and*

*(4) "parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian.*

### *§ 6332. Family leave requirement*

*(a)(1) An employee shall be entitled, subject to section 6334, to 10 workweeks of family leave during any 24-month period—*

*(A) as the result of the birth of a son or daughter of the employee;*

*(B) as the result of the placement, for adoption or foster care, of a son or daughter with the employee; or*

*(C) in order to care for the employee's son or daughter or parent who has a serious health condition.*

*(2) The entitlement to leave under paragraphs (1)(A) and (1)(B) shall expire at the end of the 12-month period beginning on the date of such birth or placement.*

*(3) In the case of a son or daughter or parent who has a serious health condition, such leave may be taken intermittently when medically necessary, subject to subsection (e).*

*(b) On agreement between the employing agency and the employee, leave under this section may be taken on a reduced leave schedule, however, such reduced leave schedule shall not result in a reduction in the total amount of leave to which the employee is entitled.*

*(c) Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.*

*(d)(1) If any employing agency provides paid family leave for fewer than 10 workweeks, the additional weeks of leave added to attain the 10 workweeks total may be unpaid.*

*(2) An employee or employing agency may elect to substitute any of the employee's accrued paid vacation leave, personal leave, or other appropriate paid leave for any part of the 10-week period.*

*(e)(1) In any case in which the necessity for leave under this section is foreseeable based on an expected birth or adoption, the employee shall provide the employing agency with prior notice of such expected birth or adoption in a manner which is reasonable and practicable.*

*(2) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee shall—*

*(A) make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee's son or daughter; and*

*(B) provided the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.*

*(3) The Director of the Office of Personnel Management shall promulgate regulations that define the term "reasonable and practicable" for purposes of paragraphs (1) and (2)(B).*

***§ 6333. Temporary medical leave requirement***

*(a)(1) Any employee who, as the result of a serious health condition, becomes unable to perform the functions of the position of the employee, shall be entitled to temporary medical leave, subject to section 6334.*

*(2) The entitlement under paragraph (1) shall continue for as long as the employee is unable to perform the functions, except that the leave shall not exceed 13 administrative workweeks of the employee during any 12-month period.*

*(3) Leave taken under this subsection may be taken intermittently when medically necessary, subject to subsection (d).*

*(b) Except as provided in subsection (c), leave granted under subsection (a) may consist of unpaid leave.*

*(c)(1) If an employing agency provides paid temporary medical leave or paid sick leave for fewer than 13 weeks, the additional weeks of leave added to attain the 13-week total may be unpaid.*

*(2) An employee or employing agency may elect to substitute the employee's accrued paid vacation leave, sick leave, or other appropriate paid leave for any part of the 13-week period, except that nothing in this Act shall require an employing agency to provide paid sick leave or paid medical leave in any situation in which such employing agency would not normally provide any such paid leave.*

*(d)(1) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment of supervision, the employee shall—*

*(A) make a reasonable effort to sechedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the employee's health care provider, and*

*(B) provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.*

*(2) The Director of the Office of Personnel Management shall promulgate regulations that define the term "reasonable and practicable" for purposes of paragraph (1).*

***§ 6334. Certification***

*(a) An employing agency may require that a claim for family leave under section 6332(a)(10)(C), or temporary medical leave under section 6333, be supported by certification issued by the health care provider of the son, daughter, parent, or employee, whichever is appropriate. The employee shall provide a copy of such certification to the employing agency.*

*(b) The certification shall be considered sufficient if it states—*

*(1) the date on which the serious health condition commenced;*

*(2) the probable duration of the condition;*

*(3) the appropriate medical facts within the knowledge of the provider regarding the condition; and*

*(4)(A) for purposes of leave under section 6333, a statement that the employee is unable to perform the functions of the employee's position; and*

*(B) for purposes of leave under section 6332(a)(1)(C), an estimate of the amount of time that the employee is needed to care for the son, daughter, or parent.*

*(c)(1) In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a), the employing agency may require, at its expense, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning the information certified under subsection (b).*

*(2) Any health care provider designated or approved under paragraph (1) may not be employed on a regular basis by the employing agency.*

*(d)(1) In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at its expense, that the*

*employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).*

*(2) The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employing agency and the employee.*

*(e) The employing agency may require that the employee obtain subsequent recertifications on a reasonable basis.*

***§ 6335. Job protection***

*An employee who uses leave under section 6332 or 6333 of this title shall be entitled, on return from the leave—*

*(1) to be restored to the position of employment held by the employee when the leave commenced; or*

*(2) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.*

***§ 6336. Prohibition of coercion***

*(a) An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of the rights of the employee under this subchapter.*

*(b) For the purpose of this section, "intimidate, threaten, or coerce" includes promising to confer or conferring any benefit (such as appoontment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation).*

***§ 6337. Health insurance***

*An employee enrolled in a health benefits plan under chapter 89 of this title who is placed in a leave status under section 6332 or 6333 of this title may elect to continue the health benefits enrollment of the employee while in leave status and arrange to pay into the Employees Health Benefits Fund (described in section 8909 of this title), through the employing agency of the employee, the appropriate employee contributions.*

***§ 6338. Regulations***

*The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1989.*

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